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NO. ____

IN THE
Supreme Court of the United States

LUCIEN B. CALHOUN AND ROBIN L. CALHOUN,
Petitioners,

v.

YAMAHA MOTOR CORPORATION, U.S.A. AND
YAMAHA MOTOR CO., LTD.,
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a prior decision in this case, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), this Court held that state law could provide a remedy for wrongful death in the territorial waters of the United States caused by a jet ski manufactured by Yamaha. In footnote 14, the Court expressly left open the issues of whether state or federal law determined Yamaha's liability, and if state law governed, which state's laws would apply. After a decision on those issues by the Third Circuit, the question now presented is:

In a state law based claim arising out of the death of a 12 year old girl who was riding a jet ski, does the fact that there is admiralty as well as diversity jurisdiction require the federal court to apply federal substantive law and choice of law rules as to issues of liability and compensatory and punitive damages, where the claim is based on defects in the design and manufacture of the jet ski and not on any conduct that took place in the territorial waters where the death occurred?

PARTIES TO THE PROCEEDING

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The opinion of the Third Circuit is reported at 216 F.3d 338 (3d Cir. 2000) and is set forth in the Appendix to the petition at App. A1-A34. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 40 F. Supp. 2d 288 (E.D. Pa. 1999) and is set forth at App. A35-A56. The order denying rehearing and rehearing en banc is not reported, but is set forth at App. A57-A58. The opinion of this Court when this case was previously before this Court is reported at 516 U.S. 199 (1996).

STATEMENT OF JURISDICTION

The opinion of the Third Circuit was issued on June 23, 2000. The petition for rehearing en banc was denied by order dated August 1, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

Section 1333(1) of Title 28 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

This is a wrongful death action filed by Lucien and Robin Calhoun to recover damages for the death of their 12 year old daughter Natalie, who was killed in an accident resulting from a collision between the "Wavejammer" jet ski on which she was riding and a vessel anchored in the territorial waters of Puerto Rico. The Calhouns, who are citizens of Pennsylvania,

sued Yamaha Motor Company, Ltd., the manufacturer of the Wavejammer, which is incorporated and has its principal place of business in Japan, and Yamaha Motor Corporation, U.S.A., its distributing arm in the United States, which is incorporated and has its principal place of business in California. As noted above, this case has previously been before this Court, with the Yamaha defendants as petitioners and the Calhouns as respondents. Because the positions of the parties in this Court are now reversed, and since this petition will refer to the prior opinion and the decision below, the petition will use the names "Calhouns" and "Yamaha" instead of petitioner and respondent.

The Calhouns' complaint was filed on June 27, 1990, seeking both compensatory and punitive damages under Pennsylvania's wrongful death and survival statutes, 42 Pa. Cons. Stat. Ann. §§ 8301-2 (West 1995). It asserts various theories of liability resulting from defects in the design and manufacture of the Wavejammer, none of which occurred in Puerto Rico. Subject matter jurisdiction was alleged based on 28 U.S.C. § 1332 (diversity) and § 1333(1) (admiralty).

The first voyage to this Court began when Yamaha moved for partial summary judgment on the theory that the decision in *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a federal cause of action for wrongful death in territorial waters, caused by an unseaworthy vessel, eliminated state law based claims for wrongful death. The district court granted that motion in part but allowed the Calhouns to take an interlocutory appeal under 28 U.S.C. § 1292(b). The Third Circuit affirmed in part, and reversed in part, but its principal ruling was that non-seamen such as the Calhouns could maintain a state law wrongful death action despite *Morange*. 40 F.3d 622 (1994). Yamaha then obtained review in this Court, and after full briefing and argument, the

Court unanimously affirmed the holding that the Calhouns' state law wrongful death claim could proceed. Because much of this Court's reasoning bears directly on the issues presented in this petition, we review that decision in some detail.

Yamaha's position in this Court was that *Morange* had created a uniform federal cause of action for wrongful deaths occurring in state territorial waters that ousted all state law remedies. 516 U.S. at 209. In rejecting that argument, the Court reviewed the cases leading up to *Morange*, including *The Harrisburg*, 199 U.S. 199 (1886), which had held that there was no federal wrongful death cause of action applicable to territorial waters and was overruled by *Morange*. *Id.* at 206-11. The Court noted that, despite *The Harrisburg*, state wrongful death claims had always been allowed to proceed, *id.* at 206-07, and that it was the lack of a uniform federal remedy based on claims of unseaworthiness that caused the *Morange* Court to overrule *The Harrisburg*. *Id.* at 211. Thus, the Court made clear that the impetus for creating a federal wrongful death cause of action in territorial waters was not an anomaly resulting from the application of state law, but rather the anomalies arising from the absence of a maritime cause of action for wrongful death based on unseaworthiness, which, by then, had become the dominant basis for maritime torts. *Id.* at 211-13.

The Court also rejected Yamaha's plea for federal uniformity, contrasting cases involving non-seafarers, such as Natalie Calhoun, whose rights Congress had not prescribed in legislation (other than for deaths on the high seas), with those involving seamen and longshore and harbor workers, for whom Congress had established elaborate and comprehensive compensation schemes. *Id.* at 215. On that basis, this Court affirmed the ruling of the Third Circuit that the Calhouns' wrongful death and survival claims based on Pennsylvania state

law were not displaced by the federal remedy for wrongful death based on unseaworthiness recognized in *Morange*. In its final footnote, the Court specifically recognized that the issues of whether federal or state law would govern the standards for imposing liability, and, if state law applied, whether the law would be that of Pennsylvania or Puerto Rico, would have to be resolved on remand. *Id.* at 216 n.14.

The case was sent back to the district court, which concluded that the law of Pennsylvania applied to claims for compensatory damages, but that the law of Puerto Rico applied to both punitive damages and issues of liability. App. A42-A44, A49-A51. The district court again certified its order for interlocutory appeal, and the Third Circuit agreed to review it. As a threshold matter, the panel (none of whom sat on the prior appeal) decided that the question of whether to apply federal, rather than state, choice of law rules was controlled by the existence of admiralty jurisdiction in this case. App. A10. Because there was indisputably subject matter jurisdiction based on diversity of citizenship, the court's opinion, written by Judge Garth, acknowledged that ordinarily the court would apply the choice of law rules of the forum state, here Pennsylvania. App. A9. In addition, the court of appeals stated that this Court's prior holding had relied on state law, which "suggests that the present matter falls outside of our admiralty jurisdiction." App. A11. However, the court of appeals believed that, if this claim fell within the admiralty jurisdiction, as construed in this Court's recent decisions, it was bound to disregard both the state law basis of the claim and the existence of diversity jurisdiction and to apply federal choice of law principles. App. A11-A14. The court then concluded that this accident was within the admiralty jurisdiction – a holding that the Calhouns do not challenge because it should have no effect on the proper choice of law – and applied federal choice of law rules to this case. App. A14.

After concluding that the fact that the accident occurred in Puerto Rico was not "fortuitous" as that term has been used in choice of law cases, App. A17-A19, the court determined that the laws of Pennsylvania would apply to claims for compensatory damages since Pennsylvania had the most significant interest in assuring that the Calhouns were properly compensated. App. A19. As to punitive damages, however, the court found that Puerto Rico had the dominant interest because the accident occurred there, App. A19-A20, although the defects relied on by the Calhouns were embedded in the jet ski long before it arrived or was used in Puerto Rico and would have rendered the jet ski defective regardless of where it was operated.

Finally, the opinion turned to the issue of what substantive law would govern liability. If, as Yamaha argued, federal law applied, Yamaha would be permitted to seek to reduce the damages to be awarded the Calhouns by showing that Natalie was herself negligent, a defense that would not be allowed if the case were tried under Pennsylvania law. App. A5 n.4, A21 n.16. The court of appeals recognized this Court's apparent reliance on state law in its prior decision in this very case, as well as the many other decisions relying on state law, but it nonetheless concluded that the federal interest in uniformity demanded that federal maritime law, not Pennsylvania law, be used to determine Yamaha's liability. App. A25-A27. In so ruling, the court did not identify any substantive maritime law, regulation, or policy that would be undermined if state law applied, nor did the court appear to consider that the issue of interference with federal law had any place in its analysis.

Judge Nygaard dissented as to punitive damages only. App. A29. He did not challenge the majority's reliance on

admiralty jurisdiction to determine the applicable choice of law principles, nor did he disagree that federal substantive maritime law had to govern this Pennsylvania wrongful death claim: his disagreement was over how to apply federal choice of law rules to this case. Judge Nygaard concluded that Puerto Rico had no interest in applying its laws on punitive damages – which make punitive damages unavailable in this situation – where the wrongful conduct alleged by the Calhouns occurred in Japan. App. A30-A32.

A petition for rehearing en banc was denied on August 1, 2000, with Chief Judge Becker, who had written the first opinion in this case, and Judge Ambro, dissenting. App. A57-A58.

REASONS FOR GRANTING THE WRIT

The petition should be granted because it satisfies each of the criteria set forth in Rule 10 of the Rules of this Court: (A) the petition presents an important question of federal law that has not been, but should be, decided; (B) the analysis employed by the Third Circuit in reaching its decision is in direct conflict with the analysis used by other courts of appeals facing similar issues; and (C) the principles of law on which the Third Circuit based its decision are in conflict with principles that this Court has set forth in a number of applicable rulings.

A. The Question Is Important and Unresolved.

In its prior decision in this very case, the Court declined to decide the choice of law questions that the Third Circuit resolved adversely to the Calhouns:

We thus reserve for another day reconciliation of

> the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law has held sway. Compare *Kermarec* [*v. Compagnie General Transatlantique,*] 358 U.S. [625,] 628 [(1959)] (personal injury); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (same), with *Hess v. United States*, 361 U.S. 314, 319 (1960) (wrongful death); *The Tungus v. Skovgaard*, 358 U.S. 588, 592-594 (1959) (same).

516 U.S. at 216 n.14. And in a portion of footnote 14 preceding this quotation, the Court specifically recognized that the remaining issues included "whether Pennsylvania's wrongful-death remedies or Puerto Rico's apply" and what is the "source – federal or state – of the standards governing liability, as distinguished from the rules on remedies." Accordingly, today is that "[]other day" that the Court envisioned would occur, and the issue of whether the Third Circuit was correct in applying both federal substantive law principles and federal choice of law rules to the issues of liability and compensatory and punitive damages under Pennsylvania's wrongful death statute, is clearly and directly presented.

The issue presented is also important. Recreational boating of various kinds is an extremely popular activity in the United States; it is also a dangerous one. The United States Coast Guard maintains statistics and issues an annual report on boating accidents, most recently for 1998. U.S. Department of Transportation, United States Coast Guard, *Boating Statistics – 1998*, COMDTPUB P16754.12 <http://www.uscgboating.org /saf/pdf/Boating_Statistics_1998.pdf>. In 1998, there were more than 12 million boats covered by the report, *id.* at 23, of

which 11,368 were involved in an accident of some kind. *Id.* at 31. Yamaha's Wavejammer appears to be classified as a "personal watercraft," *id.* at 42, and there were 3,607 accidents for such vessels, in which 78 people died and 1743 were injured, *id.* at 31, of whom 1182 were admitted to a hospital. *Id.* at 22. *See also* Amy Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, Aug. 27, 1995, at A1 (reporting 56 jet ski deaths in 1994 alone); Jon Nordheimer, *Watercraft Stir a Mix of Irritation and Thrills*, N.Y. Times, Aug. 27, 1995, at 31 (same).

The Coast Guard report does not speak directly to whether the accidents occurred within the navigable waters of the United States, where admiralty jurisdiction would probably lie, or in non-navigable waters, such as a landlocked lake, a man-made reservoir, or a shallow stream or creek. Instead, the report breaks down the accident data by the type of body of water on which the accident took place, some of which – such as "Ocean/Gulf, Great Lakes" and "Bays, inlets, sounds, harbors" – are almost certainly navigable waters. U.S. Department of Transportation, *supra*, at 38. For 1998, on those bodies of water, for all types of boats, there were 1457 accidents and 144 fatalities. There were also a total 5593 accidents, which produced 622 fatalities, on the two categories listed as "Rivers, streams, creeks" and "Lakes, ponds, reservoirs, dams, gravel pits" – many of which are presumably non-navigable waters.

These statistics make two points about the importance of the issues presented. First, there are a great many accidents involving personal watercraft, a substantial but indeterminate number of which are likely to have occurred on navigable waters. For each of them (and perhaps for other non-boating accidents that occur on such waters), there is a question as to

the applicability of federal or state law. Second, given these statistics, it seems almost certain that there are a substantial number of boating accidents involving personal watercraft, such as the Wavejammer, that occur on non-navigable waters as to which there is no basis for admiralty jurisdiction, and hence only state law can apply. Thus, if the court of appeals is correct in applying federal law because there is admiralty jurisdiction in this case, an identical jet ski accident occurring on inland waters, alleging the same defects, would be decided under state law, even though the conduct forming the basis for liability almost certainly occurred in Japan or on some other land-based location. The notion that the same conduct, involving the same product, could be judged under federal standards if the death occurred on navigable waters, and under a different standard if the accident took place on a landlocked lake, provides another reason why this case presents an important, unresolved question that this Court should decide.

Commentators who have examined the choice of law questions after the prior decision in this case recognize the need to clarify the questions left open in footnote 14. The most comprehensive article is Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273 (1999), which surveys this Court's decisions and urges a narrow role for federal law when a plaintiff chooses to rely on state law. The author not only argues for a result quite different from what the court of appeals held here, but also makes clear that the law in this area is badly in need of clarification. Another admiralty expert also decries the confusion, to the point where he asserts that "all of the theories various commentators have developed in efforts to synthesize this body of jurisprudence are untenable," not because his colleagues are incapable of reasoned analysis, but because he concludes that the decisions are so conflicting as to require this Court's attention to straighten out the law. David

A. Robertson, *Symposium: Federalism and Uniformity in Maritime Law: The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Mar. Law 81, 95 (1996). In short, this petition presents an important question that commands this Court's attention.

B. The Circuits Are Divided on the Governing Principles To Be Applied.

We acknowledge that this case does not present a classic division in the circuits over a pure question of law (such as the interpretation of a statute). Nor is the result in this case inconsistent with the result in another case involving the same or even similar facts. Rather, it is the method of analysis that the Third Circuit used to decide these questions that is directly at odds with the methods used by other courts of appeals in these kinds of cases. Unless resolved by this Court, the lower courts will continue adrift in this area of the law.

The touchstone of the Third Circuit's decision is its ruling that the district court had subject matter jurisdiction because this is an admiralty case and that, as a result, federal law, rather than state law, applies. We do not quarrel with the conclusion that there is admiralty jurisdiction, although that ruling was wholly unnecessary since there is admitted diversity of citizenship between the parties and the amount in controversy exceeds $75,000, as 28 U.S.C. § 1332 requires. But the conclusion that, because there was admiralty jurisdiction, federal law must be used, even though the claim is based on Pennsylvania's wrongful death statute, is in direct conflict with the way that other courts of appeals have treated the relevance of subject matter jurisdiction when the issue is whether state or federal law applies to a death or injury occurring on navigable waters.

There are two separate aspects of the ruling below that are inconsistent with decisions from other circuits. First, the Third Circuit gave talismanic significance for choice of law purposes to its conclusion that the case was within the district court's admiralty jurisdiction, but other courts of appeals, post-*Yamaha*, have recognized that, even as to maritime matters, subject matter jurisdiction does not determine whether federal or state law applies. For example, in *In re Amtrak "Sunset Ltd." Train Crash*, 121 F.3d 1421 (11th Cir. 1997), a commercial tug was towing six barges in state waters when it struck a bridge that carried a train, causing many deaths and injuries, as well as considerable property damage, in what was admittedly an "admiralty action." *Id.* at 1422. In contrast to what the Third Circuit did here, the Eleventh Circuit applied state law except with respect to two aspects of the claims where state law was in direct conflict with established principles of maritime law: Alabama law allows punitive damages on a showing of simple negligence in death actions, whereas maritime law requires a higher degree of wrongdoing, and maritime law requires apportionment of damages among joint tortfeasors, which Alabama prohibits. *Id.* at 1423. While the Eleventh Circuit rejected the applicability of state law on those two issues, it did so because "substantive admiralty law rights are being threatened," *id.* at 1426, and not simply because there was admiralty subject matter jurisdiction, as the Third Circuit held here, without even an inquiry as to whether the application of state law would harm federal maritime interests.

The Fourth Circuit's decision in *Wells v. Liddy*, 186 F.3d 505 (1999), *cert. denied*, 120 S. Ct. 939 (2000), is even more in conflict since it ascribes no significance to subject matter jurisdiction. Among the claims in that case was one for defamation based on statements made by the defendant, one of which occurred while defendant was giving a lecture on a cruise

ship in the Mediterranean. Under the approach taken by the Third Circuit, the court in *Wells* would first have had to decide whether there was admiralty jurisdiction before ruling on choice of law issues. But the Fourth Circuit, correctly in our view, did not even decide the jurisdictional question, *id.* at 524, n.16, because it did not link its choice of law rulings to the presence or absence of admiralty jurisdiction, as did the Third Circuit.

The conflict between the Third Circuit's approach to choice of law questions, under which the existence of admiralty subject matter is determinative, and that of other circuits that look to other factors, is perhaps most starkly seen in *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1997). There the court was faced with a wrongful death claim on behalf of a self-employed individual who was killed while inspecting a vessel that was docked in navigable waters. In the course of deciding which substantive law applied, the Ninth Circuit observed both that the plaintiff has a choice of suing in federal court in admiralty, in federal court under diversity if more than $75,000 is at stake, or in state court, and that the same substantive law applies, regardless of the forum or basis of subject matter jurisdiction. *Id.* at 1054-55. Since the plaintiff there could have filed a negligence action at common law, the *Ghotra* court held that the right to jury trial was retained, even if he had included a claim based on in rem admiralty jurisdiction. *Id.* at 1056. Ultimately, the Ninth Circuit ruled that the state claim was preempted by federal law because of the comprehensive liability and compensation scheme that was created for all seafarers, even those, like that plaintiff, whose self-employment resulted in the denial of his claim based on liability without fault that is available to employees. *Id.* at 1066.

Not only is the analytical divide between *Ghotra* and the decision below evidence of the conflict among the circuits on

the issue of the impact of subject matter jurisdiction on choice of law, but in *Ghotra* the ultimate decision to apply federal law on liability was based on a standard preemption analysis, which the Third Circuit never used. That was the same analysis employed by the Eleventh Circuit in *Amtrak*, where the court declined to follow state law only when it "threatened" important substantive admiralty rights. 121 F.3d at 1426. And in *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209 (4th Cir. 2000), *petition for cert. filed* (U.S. Aug. 30, 2000) (No. 00-346), the court upheld a negligence claim for wrongful death, as opposed to one based on lack of seaworthiness, but only after determining that it was consistent with general maritime policies. *Id.* at 220. The decision allowed the claim to go forward even though the plaintiff conceded that Virginia's general wrongful death cause of action was unavailable against that defendant under the facts of this case. *Id.* Moreover, a state law claim against another defendant that had been dismissed without prejudice from the federal action in *Garris* was re-filed in state court with no suggestion that the existence of a federal claim affected the right to maintain that state law action in any way.

The Supreme Court of Iowa recently declined to apply broad maritime preemption principles to a state law retaliatory discharge complaint by licensed riverboat captains who alleged that they were fired for refusing to violate federal safety regulations. *Clements v. Gamblers Supply Management Co.*, 610 N.W.2d 847 (Iowa 2000), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000). In reaching that result, the court relied on a pre-*Yamaha* opinion of the First Circuit that held that state law claims for unlawful discharge, by a person who had been treated successfully for alcoholism, were not preempted by federal maritime law simply because the plaintiff worked on an ocean-going tanker, absent a direct conflict with substantive maritime

law. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993). Neither opinion was based on the presence or absence of admiralty jurisdiction, and both were decided by finding that the application of state law did not work any actual interference with maritime law, rather than, as the Third Circuit did, assuming that all applications of state law inevitably harm federal maritime interests.

In short, the other courts that have spoken on this issue post-*Yamaha* agree that the existence of subject matter jurisdiction in admiralty does not determine (and perhaps is not even relevant to) the issue of whether federal or state law applies, as the Third Circuit held, and that state law can be utilized, if the plaintiff chooses, so long as it does not interfere with substantive federal maritime law or policies. Accordingly, the Court should grant review to resolve this conflict in approaches to the choice of law issue.

C. The Decision Below Conflicts With Principles Enunciated by This Court.

The decision below also conflicts with rulings of this Court. As with the rulings from other circuits, the conflicts with the decisions of this Court are not on the precise choice of law question presented by the facts of this case, but with the principles and methods of analysis used in decisions that pre-date *Yamaha* and for which there is no suggestion in *Yamaha* that the Court intended to overrule them in upholding the Calhouns' wrongful death claim based on Pennsylvania law.

The principal error made by the court of appeals is its almost reflexive adoption of federal law simply because this is an admiralty case. Aside from the strong emanations in *Yamaha* itself that state law did not simply provide a procedural vehicle

to get into court, this Court on numerous occasions has made clear that federal maritime law overrides state law only when there is a good reason for doing so. Indeed, in this Court's most recent case dealing with the issue of admiralty jurisdiction, which the Third Circuit failed to mention, *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the Court found admiralty jurisdiction, and then spoke directly to the relation between jurisdiction and choice of law: "Contrary to what the city suggests, . . . exercise of federal admiralty jurisdiction does not result in automatic displacement of state law." *Id.* at 545. *See also Hess v. United States*, 361 U.S. 314, 324, 328 (1961) (Harlan, J., dissenting) (stating that if conduct is maritime, then forum court is irrelevant, as is basis of jurisdiction).

Not only has this Court rejected the kind of mechanical linkage adopted by the Third Circuit, but it has taken great pains to assure that state laws are displaced only when they significantly interfere with federal law. By contrast, for seafarers, the Court has been reluctant to allow state law to co-exist with federal law because Congress has expressly created a comprehensive liability scheme that deals with these issues. That rationale was found to be irrelevant in *Yamaha* because non-seafarers, like Natalie Calhoun, are not covered by *any* federal statutory plan except for deaths on the high seas, and this accident occurred in the territorial waters of Puerto Rico.

On the issue of interference with federal law, the Third Circuit never asked how federal policies would be subverted by applying state law (including state choice of law rules), but simply assumed that federal law had to apply. The decision that seems to form the basis of the approach that maritime law inevitably supplants state law is *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), in which the Court declined to allow the

application of a state worker's compensation law to a person offloading a docked vessel because the Court concluded that the work was maritime in nature and within the admiralty jurisdiction. *Id.* at 217. But regardless of the merits of the holding in *Jensen*, even *Jensen* recognized the propriety of allowing state law to be used except where "it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216. Indeed, in a recent decision of this Court rejecting federal preemption of state rules on forum non-conveniens, *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), *Jensen* was cited with approval as a basis for finding no need for uniformity on that issue, *id.* at 447, in contrast with the need for uniform laws governing the primary conduct of a defendant – here, the process of designing and manufacturing the Wavejammer, not any wrongdoing that took place in Puerto Rico.[1]

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[1]In his opinion in *American Dredging*, concurring in part and concurring in the judgment, Justice Stevens expressed his view that *Jensen* "is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York*, 198 U.S. 45 (1905), would be in a case under the Due Process Clause." 510 U.S. at 458 (parallel citations omitted). Justice Frankfurter, dissenting in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), observed: "Certainly no decision in the Court's history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than" *Jensen*. *Id.* at 742-43. The majority in *American Dredging* upheld the application of state law despite *Jensen*, and it specifically declined to decide

(continued...)

Since *Jensen*, in virtually every maritime case in which the issue of the applicability of state law has arisen, the Court has described the test as whether state law would interfere in some significant way with federal maritime rights, a test that the Third Circuit did not mention, let alone attempt to satisfy. Thus, in *Just v. Chambers*, 312 U.S. 383 (1941), where the tort was unquestionably of a maritime nature, state law was permitted to supplement federal law "when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Id.* at 388. According to the Court, uniformity "is required only when the essential features of an exclusive federal jurisdiction are involved," which was not the case there since the Court found "no repugnance" to federal law in applying state law. *Id.* at 392. Similarly, Justice Frankfurter in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), observed that the statement that all admiralty law is federal is a "destructive oversimplification," but that "state law must yield to the needs of a uniform federal maritime law where

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[1](...continued)
Jensen's validity because the issue had not briefed or argued. 510 U.S. at 447 n.1. Justice Scalia did note, however, that it "would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence or indeed is even entirely consistent within our admiralty jurisprudence." *Id.* at 452. The Calhouns contend that, despite this confusion, they are entitled to prevail even in the face of *Jensen*, and hence will not brief its continuing viability in the absence of a request from the Court to do so. For an excellent discussion of the problems with *Jensen*, a plea for overruling it, and a recommendation for an appropriate preemption analysis in this and other similar cases, *see* Young, *supra.*

this Court finds inroads on a harmonious system." *Id.* at 373. And in *Hess v. United States*, 361 U.S. 314 (1960), where state law was made applicable to a tort that was within the admiralty jurisdiction by the specific dictates of the governing statute (the Federal Tort Claims Act, 28 U.S.C. § 2674), the Court recognized that in some cases federal law would override state laws if those laws were "so offensive to traditional principles of maritime law that the admiralty [courts] would decline to enforce them." *Id.* at 320.[2]

Even where an insurance company issued a policy covering a commercial vessel, in what was agreed was a maritime contract, the Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), applied state law to invalidate a condition in the contract, an issue on which maritime law was unsettled. In so ruling, it noted that "it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule." *Id.* at 313. In his concurrence, Justice Frankfurter took a similar view: "[T]he demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. . . . [The admiralty law expansion] has been a response to demands more inclusive than those for mechanical uniformity." *Id.* at 323-24. *See also Sun Ship, Inc.*

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[2]Justice Harlan dissented, not because he believed that maritime law must always prevail, but because he found the application of this state law "offensive to maritime law." *Id.* at 323. His opinion specifically rejected the notion adopted by the Third Circuit that the basis of subject matter jurisdiction, or whether the case is in federal or state court, is a proper ground for resolving these issues. *Id.* at 328.

v. Pennsylvania, 447 U.S. 715, 726 (1980) (declining to adopt federal rule "in the name of uniformity").[3]

There are, to be sure, modern cases displacing state law with federal law. In two of them identified by the Court in footnote 14 in *Yamaha – Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) – federal law was applied, resulting in recoveries for the plaintiff who would have lost under state law. Perhaps more significant than the decision as to whether to apply federal or state law is that neither case suggested a test other than one in which the outcome is based on an assessment of the level of interference with maritime law by allowing state law to operate. Although there is language in those opinions from which one might conclude that federal interests are generally given greater sway than those of the states in maritime cases, it is not conclusive, and the inconsistency with other cases discussed above forms a further basis for review, as this Court observed in footnote 14 in *Yamaha*.

The other prominent case in which federal law was applied, *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), was also one in which applying state law, in that case to an oral

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[3]If uniformity were paramount, the proper outcome here might be to apply the law of unseaworthiness to jet skis, even though many jet ski accidents will not occur on navigable waters. The notion of applying traditional maritime law concepts such as unseaworthiness to products such as jet skis, for which the common law of products liability is already well-developed, is a further reason why the result below is unsound and should be reviewed by this Court.

promise, would have deprived the plaintiff seaman of a remedy. The Court's finding that the contract was maritime was not conclusive, and the Court explicitly observed that the process of deciding which law to apply "is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern." *Id.* at 739. In choosing federal law, the Court found persuasive in this context the need for uniformity since the promise might have been made anywhere in the world, *id.* at 741, but never suggested that federal law is always applicable in maritime cases on that basis alone.[4]

In addition to the cases in footnote 14, there are also the forceful dissents in *Hess* and in *Foremost Ins. Co. v.*

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[4]Both *Kossick* and *Kermarec* were diversity cases, which confirms that subject matter jurisdiction is not, as the Third Circuit thought, dispositive of choice of law. By the same token, in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), where state law was utilized, the case was in the federal court on admiralty jurisdiction, which could not have happened under the Third Circuit's theory. *But see East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 & n.2 (1986) (observing that, although plaintiff did not seek to apply state law, "[w]ith admiralty jurisdiction comes the application of substantive admiralty law"). Footnote 14 suggests that the difference in use of substantive federal and state law may result from the fact that some of the cases involve wrongful deaths, for which there was no federal remedy for non-seafarers until recently, and others were claims for personal injuries, for which that problem did not exist. In our view, that line is not an appropriate one for deciding whether federal or state law applies, but in any event, it is not the basis on which the court of appeals reached its decision in this case.

Richardson, 457 U.S. 668 (1982), that suggest a wide berth for federal law in these kinds of situations. In *Hess*, Justice Harlan, joined by Justice Frankfurter, dissented because the majority had not found "the federal interest in regulating the conduct of the dam owner [on whose property the decedent was working] is so minimal – whether by reason of the fixed situs of the dam or on some other ground – that the federal supremacy principle may reasonably be found inapplicable," 361 U.S. at 338, a standard that can be read to be less favorable to state law claims than that set forth in other decisions. In *Foremost*, the issue before the Court was whether there was federal admiralty jurisdiction over claims arising from a collision of two pleasure boats where there was no diversity between the parties. In disagreeing with the Court's finding of a connection to maritime matters, Justice Powell, also writing for Chief Justice Burger and Justices Rehnquist and O'Connor, observed: "The Court's opinion largely ignores the fact that expansions of federal admiralty jurisdiction are accompanied by application of substantive – and *pre-empting* – federal admiralty law." 457 U.S. at 685 (citing *Jensen* and *Kossick*). Again, although we believe that the decisions discussed above are more persuasive, the existence of arguably contradictory authority, even in dissents, is further evidence of the need for this Court's review of the question presented.

* * *

A final word on what granting the petition can and cannot do to help clarify the law. As we have argued above, the issue in this case, where the Calhouns have based their claim on state law, is not principally one of choice of law, but of preemption, since the federal-state issues would be the same if the accident had occurred on the Delaware River as it passes through Philadelphia. The principal error of the Third Circuit was its conclusion that subject matter jurisdiction was the key

to deciding which laws apply in cases like this, and a decision of this Court can make clear that the Third Circuit's approach and its result are in error. The Court can also make clear that a plaintiff may choose which set of laws will form the basis of his or her complaint, on issues of liability and of damages, but that, like any other case, under this Court's preemption doctrine, state laws may have to give way to federal law in certain circumstances. The Court could, but need not in our view in this case, address the issue of whether preemption should be applied differently in maritime cases (other than those in which there is an applicable federal statute). But even if it chooses to speak to that issue, there will still remain areas of uncertainty as there inevitably will be whenever preemption is the issue. At the very least, a decision by this Court can set the lower courts on the right course and steer them away from the shoals on which the Third Circuit has foundered.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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October 27, 2000

APPENDIX

1. Decision of the United States Court of Appeals for the Third Circuit, reported at 216 F.3d 338 and issued on June 23, 2000. A1-A34.

2. Decision of the United States District Court for the Eastern District of Pennsylvania, reported at 40 F. Supp. 2d 288 and issued on March 19, 1999. A35-A56.

3. Order of the United States Court of Appeals for the Third Circuit denying rehearing and rehearing en banc, issued on August 1, 2000 and not reported. A57-A58.

Filed June 23, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1378

LUCIEN B. CALHOUN;
ROBIN L. CALHOUN,
individually and as Administrators
of the Estate of Natalie K. Calhoun, deceased

v.

*YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
Lucien B. Calhoun;
Robin L. Calhoun,
Appellants

(* Amended as per the Clerk's 6/1/99 Order)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 90-cv-04295)
District Judge: Honorable Louis H. Pollak.

Argued Thursday, November 4, 1999

BEFORE: NYGAARD and MCKEE, *Circuit Judges*;
and GARTH, *Senior Circuit Judge*.

(Opinion filed: June 23, 2000)

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OPINION OF THE COURT

GARTH, *Circuit Judge:*

Admiralty law is considered one of the most complex areas of American law. *See* 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law*, § 1-1, at 2 (2d ed. 1994). In an earlier appeal in this matter, the United States Supreme Court held that Lucien and Robin Calhoun ("the Calhouns") may assert a cause of action based upon a state wrongful death or survival statute to obtain relief for the death of a non-seaman killed in United States territorial waters. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, (1996). We are now asked to resolve some of the problems arising from the Supreme Court's holding -- problems that the Court itself recognized -- by ruling upon two distinct questions that the Court expressly declined to decide.

In particular, we must determine (1) which state's law governs the type of damages available, and (2) whether state or federal law governs the standards by which the liability of appellees Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. will be defined. As a result, this appeal concerns the extent to which state law may co-exist in the admiralty arena that historically has been the exclusive domain of federal legislative and regulatory entities. *See generally* David R. Lapp, Note, *Admiralty & Federalism in the Wake of Yamaha Motor Corp. U.S.A. v. Calhoun:* Is *Yamaha* a Cry by the Judiciary for Legislative Action in State Territorial Waters?, 41 *Wm. & Mary L. Rev.* 677 (2000).

With regard to damages, the District Court for the Eastern District of Pennsylvania held that the law of Pennsylvania would govern the issue of compensatory damages and that the law of Puerto Rico would govern that of punitive damages. The District Court further held that the law of Puerto Rico would govern the issue of Yamaha's liability. We will affirm in part and reverse in part, affirming the District Court's holding with respect to damages (both compensatory and punitive), yet reversing the District Court's disposition concerning liability, holding instead that federal maritime law must govern the standards by which Yamaha's liability will be evaluated.

I

In July 1989, Natalie Calhoun ("Natalie"), then twelve years old, traveled to Puerto Rico with her parents' permission to vacation with a friend and that friend's family. Tragically,

however, on July 6, 1989, Natalie died when the Yamaha[1] "WaveJammer"[2] she was operating in the water bordering the resort at which she was staying struck an anchored vessel. The Calhouns, as Pennsylvania residents, filed the present action against Yamaha on June 27, 1990, seeking relief pursuant to the Pennsylvania wrongful death and survival statutes, 42 Pa. Cons. Stat. Ann. §§ 8301-8302 (West 1995). The Calhouns' complaint, which alleged defects in the WaveJammer, is grounded in theories of strict liability, negligence, and breach of implied warranties of merchantability and fitness for a particular purpose. The complaint seeks both compensatory and punitive damages. Because the law of Puerto Rico does not allow a plaintiff to recover punitive damages, the Calhouns asserted that all questions concerning the appropriate form of remedy be governed by the law of Pennsylvania. For the same reason, on the other hand, Yamaha argued for the application of the law of Puerto Rico for resolution of all damages issues.

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[1]We will refer to both Yamaha entities that are the subject of this action collectively as "Yamaha." Yamaha Motor Company, Ltd. is the manufacturing arm of the corporation, and is both incorporated and has its principal place of business in Japan. Yamaha Motor Corporation, U.S.A., is the distributing arm of the corporation, and is both incorporated and has its principal place of business in California.

[2]Although Yamaha apparently no longer manufactures the "WaveJammer," both this Court and the Supreme Court previously have described the vehicle as a class of jet ski. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202 (1996); *Calhoun v. Yahama Motor Corp., U.S.A.*, 40 F.3d 622, 624 (3d Cir. 1994). At oral argument, counsel for the Calhouns referred to the WaveJammer as a "watertoy."

Yamaha filed a motion for partial summary judgment on November 27, 1991, alleging that because Natalie died in United States territorial waters,[3] federal maritime law provided the Calhouns' sole remedy for the circumstances surrounding Natalie's death.[4] The District Court granted Yamaha's motion in part, and dismissed that portion of the Calhouns' complaint that sought punitive damages and the loss of future earnings. *See Calhoun v. Yamaha Motor Corp.*, U.S.A., No. CIV. A. 90-4295, 1993 WL 216238, at *12 (E.D. Pa. June 22, 1993). After the Calhouns took an interlocutory appeal, we affirmed in part and reversed in part. *See Calhoun v. Yahama Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. *1994).* We concluded that although the Supreme Court, in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), had eliminated the use of state law causes of action for deaths of *seamen* in territorial waters, state causes of action still remained available as relief for the death of *non-*

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[3]The term "territorial waters" refers to "all inland waters, all waters between line of mean high tide and line of ordinary law water, and all waters seaward to a line three geographical miles distant from the coast line." *Black's Law Dictionary* 1473 (6th ed. 1990); *see also Calhoun*, 40 F.3d at 624 (quoting William C. Brown, III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 *Tul. L. Rev.* 577, 581 (1994)). The parties do not dispute that Natalie's death occurred in the territorial waters surrounding the Commonwealth of Puerto Rico.

[4]As we discuss *infra*, the Calhouns opposed the application of federal maritime law to the substantive liability issues presented in the litigation because as opposed to the law of Pennsylvania, federal maritime law would allow Yamaha to introduce evidence of Natalie's negligence. *See infra* n.16

seamen in territorial waters. The Supreme Court granted certiorari, *see Yamaha Motor Corp., U.S.A. v. Calhoun*, 514 U.S. 1126 (1995), and affirmed in an unanimous opinion. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

Neither the original panel of this Court nor the Supreme Court, however, answered the questions that emerged from their respective holdings. *See Yamaha*, 516 U.S. at 216 n.14; *Calhoun*, 40 F.3d at 644-45. *First*, if the Calhouns could utilize Pennsylvania's wrongful death or survival statute to obtain relief for Natalie's death, which law[5] -- Pennsylvania's or Puerto Rico's -- governs the form of the remedy (or remedies) available to the Calhouns? *Second*, even understanding that Pennsylvania's wrongful death or survival statute provides the vehicle through which this action may proceed, does federal maritime law or state law provide the standards by which Yamaha's substantive liability will be determined? If the answer to this latter question is state law, will such liability standards be derived from the law of Pennsylvania or Puerto Rico?

On remand from the Supreme Court, the District Court issued a preliminary ruling on the first of these questions during a hearing held on September 23, 1998, a ruling that the District Court finalized in an opinion and order filed on March 22, 1999. *See Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F. Supp. 2d 288 (E.D. Pa. 1999). Specifically, the District Court held that because the present action "sounds in admiralty," federal choice-

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[5]Although Puerto Rico is technically classified as a "commonwealth" and not a "state," we, as did the District Court, will use the term "state law" to describe the law of both Pennsylvania and Puerto Rico.

of-law rules[6] would be employed to determine whether Pennsylvania or Puerto Rico's law on damages would govern the present action. Invoking the doctrine of depecage,[7] the District Court held that Pennsylvania law would govern the Calhouns' claim for compensatory damages and the law of Puerto Rico would govern their claim for punitive damages. Insofar as the law of Puerto Rico did not provide for the recovery of punitive damages, the District Court granted partial summary judgment in favor of Yamaha and dismissed that portion of the Calhouns' complaint that sought punitive damages. As for the second issue, the District Court determined that state law would govern the standards of liability, and, more specifically, that the law of Puerto Rico would be the source of such standards.

The District Court again certified these issues to this Court through an interlocutory order pursuant to 28 U.S.C. § 1292(b). On April 12, 1999, we permitted the Calhouns to take this appeal.

II

The District Court's order requires us to address and answer three different questions:

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[6]As we discuss in detail infra, federal choice-of-law analysis in the admiralty arena is governed by the Supreme Court's opinion in *Lauritzen v. Larsen*, 345 U.S. (1953). *See infra Part* III-B.

[7]"Depecage" refers to the use of the law of different states to resolve different issues in the same case. *See, e.g., Ruiz v. Blentech Corp.*, 89 F.3d 320, 325 (7th Cir. 1996).

1. Did [the District Court] err in deciding, on remand, that partial summary judgment should be granted to Yamaha, precluding any claim by the Calhouns for punitive damages, on the ground that (a) the availability of punitive damages should be determined by the remedial law of Puerto Rico, the situs of the tragic accident giving rise to the suit, and (b) the law of remedies of Puerto Rico makes no provision for punitive damages?

2. Did [the District Court] err in deciding, on remand, that the Calhouns' entitlement to seek particular categories of compensatory damages should be determined by the law of remedies of Pennsylvania, the state of residence of Lucien and Robin Calhoun and of their daughter Natalie, rather than by the law of remedies of Puerto Rico, the situs of Natalie's fatal accident, and hence that Yamaha's motion for partial summary judgment should be denied insofar as it sought to preclude the Calhouns from seeking compensatory damages in conformity with the law of remedies of Pennsylvania?

3. Did [the District Court] err in deciding, on remand, that the jurisdiction whose substantive liability law is the source of the Calhouns' claims is Puerto Rico?

Calhoun, 40 F. Supp. 2d at 295-96.

III

We turn first to the questions concerning damages. In issuing its ruling, the District Court reached three separate conclusions: (1) because the action instituted by the Calhouns concerned a death occurring in the "navigable waters" of the United States, the action "sounded in admiralty," and therefore implicated federal choice-of-law rules; (2) given the differing (yet significant) interests of both Pennsylvania and Puerto Rico

in the proper mode of recovery in this matter, the use of the depecage doctrine was appropriate; and (3) because Pennsylvania has a stronger interest in providing compensation for its citizens, Pennsylvania's law would govern as to compensatory damages, and because Puerto Rico has a stronger interest in punishing Yamaha for tortious acts occurring in its territorial waters, Puerto Rico's law would govern on punitive damages. The significance of the District Court's punitive damage ruling is that the law of Puerto Rico does not allow for the recovery of punitive damages in a wrongful death or survival action.[8]

A

We must first address a threshold question: do federal choice-of-law rules govern the Calhouns' damage claims? The appropriate choice-of-law rules to be applied is controlled by the basis for our federal jurisdiction, or power to adjudicate the Calhouns' claims. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). It is axiomatic that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *see also*

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[8]The District Court's interlocutory order also inquires if it erred with respect to its more substantive holding that law of Puerto Rico would not provide the Calhouns with the opportunity for punitive damages on the facts presented in their complaint. We hold that the District Court did not err, and therefore answer this portion of the interlocutory order in the negative. *See, e.g., Barreto v. Citibank, N.A.*, 907 F.2d 15, 15 (1st Cir. 1990); *Shelley v. Trafalgar House Public Ltd.*, 977 F. Supp. 95, 96 & n.1 (D.P.R. 1997); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 84 (D.P.R. 1990).

Assicurazioni General, S.P.A. v. Clover, 195 F.3d 161, 164 (3d Cir. 1999). As such, if our jurisdiction were to be based upon diversity principles, the District Court would be bound to apply Pennsylvania choice-of-law rules insofar as the Calhouns instituted their action against Yamaha in the Eastern District of Pennsylvania. If, however, our jurisdiction were to be grounded in admiralty, federal choice-of-law principles, first identified in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), would apply. *See, e.g., Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 670 (9th Cir.), *cert. denied sub nom, Polaris Ins. Co. v. Aqua-Marine Constructors, Inc.*, 522 U.S. 933 (1997); *Complaint of Kreta Shipping, S.A.*,1 F. Supp. 2d 282, 284-85 (S.D.N.Y. 1998); *AGIP Petroleum Co. v. Gulf Island Fabrication, Inc.*, 920 F. Supp. 1318, 1323 (S.D. Tex. 1996).

The Calhouns initially averred that the District Court properly could exercise subject matter jurisdiction over their claim pursuant to 28 U.S.C. § 1333, which provides the federal courts with jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).[9] *See Calhoun*, 40 F.3d at 626 n.5. In an attempt to

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[9]In this initial appeal, the panel determined that the District Court could have exercised subject matter jurisdiction over the Calhouns' action pursuant to the admiralty provision of section 1333. The Supreme Court issued a similar statement in its opinion. *See Yamaha*, 516 U.S. at 206. Insofar as this determination was not necessary to either court's ultimate holding, however, it properly is classified as dictum. It therefore does not possess a binding effect on us pursuant to the "law of the case" doctrine. *See, e.g., In re City of Phila. Litig.*, 158 F.3d 711, 717 (3d Cir. 1998); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 988 F.2d 414, 429 (3d Cir. 1993) (citing *Arizona v.*

ensure the use of Pennsylvania's wrongful death and survival statutes, however, the Calhouns quickly withdrew from this position. Indeed, given the fact that the accident giving rise to this action involved the operation of a recreational -- as opposed to a commercial -- water vehicle, *see Ex Parte Easton*, 95 U.S. 68, 72-73, 24 L. Ed. 373 (1877), an application of admiralty jurisdiction would appear -- at first blush -- misplaced here. The Supreme Court's previous holding, authorizing the Calhouns' use of a state law remedy to obtain damages as relief for Natalie's death, *see Calhoun*, 516 U.S. at 216, further suggests that the present matter falls outside of our admiralty jurisdiction.

Before 1972, the Supreme Court adhered to what was known as the "locality test," which authorized the exercise of admiralty jurisdiction in all matters in which the incident giving rise to the cause of action occurred on the navigable waters of the United States. *See, e.g., Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 n.2 (1971); *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1865). *In Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), however, the Court abandoned the use of the locality test in a case concerning an airplane that crashed into Lake Erie shortly after takeoff. *See id.* at 250, 261. The Court replaced the locality test with an analysis that required a court to determine whether the incident in question bore a "significant relationship to traditional maritime activity." *Id.* at 268. Holding that an airplane crash did not bear such a relationship to traditional maritime activity, the Court held that the exercise of admiralty jurisdiction was not appropriate. *See id.*

The Court further explained the *Executive Jet* standard in *Richardson v. Foremost Ins. Co.*, 457 U.S. 668 (1982). In

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California, 460 U.S. 605, 618 (1983)).

Richardson, two boats that were being used for recreational purposes -- but had never been utilized for commercial purposes -- had collided on the Amite River in Louisiana. *See id.* at 669. Notwithstanding the lack of any nexus to commercial activity, and citing the need for uniform rules of conduct and the fact that a pleasure boat collision could potentially impact maritime commerce, the Court held that "the negligent operation of a vessel on navigable waters ... had a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction." Id. at 674-75.[10] In so holding, the Court stated that the incident giving rise to the claim in question must have some impact on maritime commerce to support admiralty jurisdiction, but that the collision of two pleasure boats satisfied such a requirement. *See id.* at 675.

The Court reemphasized these principles in *Sisson v. Ruby*, 497 U.S. 358 (1990), where the Court held that admiralty jurisdiction was available to adjudicate a cause of action concerning a fire that started on board a pleasure yacht, and proceeded to damage several other boats as well as the marina at which the owner docked the yacht. *See id.* at 360. Indeed, the

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[10]Although it announced a rule that appeared to sanction the expanded use of admiralty jurisdiction, the Court cautioned that "not every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.* at 675 n.5. In this vein, the Court cited its opinion in *Executive Jet*, arguing that although an airplane crash in navigable waters might interfere with maritime commerce, such an accident did not possess the requisite connection to traditional maritime activity. *See id.* We, however, have recently suggested that admiralty jurisdiction would extend even to a simple slip and fall that occurred on a cruise line. *See Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 73 (3d Cir. 1996).

Court held that "the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial." *Id.* at 367 (emphasis added).

Turning to the present appeal, the Yamaha WaveJammer that Natalie was operating at the time of her death is a type of pleasure craft that is almost exclusively used for recreational purposes. Nevertheless, the Court's recent jurisprudence -- namely, *Richardson* and *Sisson* -- indicates that so long as the incident in question, and the vehicles utilized therein, bears some relation to traditional maritime activity and could, in any way, impact upon the flow of maritime commerce, admiralty jurisdiction is proper. *See generally* 1 U.S.C. § 3 ("The word 'vessel' includes *every* description of watercraft or other artificial contrivance use, or capable of being used, as a means of transportation on water." (emphasis added)).

Further, much like the collision at issue in *Richardson*, the collision between the two vessels in the instant matter bears some impact, however remote, on maritime commerce. In particular, the vessel that Natalie struck could have been a commercial boat, or the ensuing investigation into the crash could have made commercial navigation in and around the marina difficult.[11] Indeed, the accident at issue here is virtually

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[11]The Court has continuously directed that in examining an incident's nexus to maritime commerce for the purposes of admiralty jurisdiction, a court must look not only to the specific impact that the particular incident had on such commerce, but to "the potential impact of [the] incident by examining its general character." *Sisson*, 497 U.S. at 363. For instance, the *Richardson* Court determined that although the collision of those particular pleasure boats in the Amite River did not

identical to the accident that occurred in *Richardson*, and as such, we hold that we properly exercise jurisdiction over this matter pursuant to the admiralty provisions of 28 U.S.C. § 1333(1). We are therefore satisfied that the District Court was correct in applying federal choice-of-law principles in determining which law on damages should be applied to this case.[12]

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threaten maritime commerce, if the same collision were to have occurred in the mouth of the St. Lawrence River, the impact on maritime commerce would have been serious. *See Richardson*, 457 U.S. at 675. This latter conclusion, the Court held, provided the District Court with admiralty jurisdiction. See id.

[12]We also hold that the District Court did not err in employing the doctrine known as "depecage." The Calhouns strongly argue against the application of this doctrine, offering as support our opinion in Broome v. Antlers' Hunting Club, 595 F.2d 921 (3d Cir. 1979). In Broome, sitting in diversity, we predicted that although the Pennsylvania courts had yet to issue a definitive opinion either approving or disfavoring the use of depecage, the Pennsylvania courts would likely approve the use of the doctrine. See id. at 923-24. Nevertheless, as we are obliged to apply federal choice-of-law principles, Broome is inapposite. We note that a number of district courts within this circuit have utilized depecage, see, e.g., City of Rome v. Glanton, 958 F. Supp. 1026 (E.D. Pa. 1996); Chemetron Investments v. Fidelity & Casualty Co., 886 F. Supp. 1194, 1199 (W.D. Pa. 1994), and that the doctrine has obtained support in our sister circuits. See, e.g., Spinozzi v. ITT Sheraton Corp., 174 F.3d 842, 848 (7th Cir. 1999); Johnson v. Continental Airlines Corp., 964 F.2d 1059, 1062 (10th Cir. 1992).

B

Federal choice-of-law rules in the admiralty arena are governed by the Supreme Court's opinion in Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254, 73 S. Ct. 921 (1964). In Lauritzen, the Court held that

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of conflict between contact between the transaction and the states or government between the transaction regulated and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

Id. at 582.

The Court identified seven factors for courts to weigh in rendering choice-of-law decisions: place of the wrongful act, law of the flag, allegiance or domicile of the injured, allegiance of the defendant shipowner, place of contract, inaccessibility of a foreign forum, and the law of the forum. *See id.* at 583-91. Many of these factors (e.g., law of the flag, allegiance of the defendant shipowner, and inaccessibility of a foreign forum), however, do not apply to the present dispute, which concerns entirely domestic interests.

Lauritzen itself involved a choice between the law of the United States and that of Denmark, *see id.* at 573-74, and, indeed, the *Lauritzen* factors are most often applied to determine whether the admiralty law of the United States or that of a foreign state should be applied to a particular dispute. *See, e.g., Carbotrade S.p.A. v. Bureau Veritas*, 99 F.3d 86, 89 (2d

Cir. 1996); *Zacaria v. Gulf King 35, Inc.*, 31 F. Supp. 2d 560, 563 (S.D. Tex. 1999). The *Lauritzen* Court recognized this focus on international disputes. *See Zacaria*, 31 F. Supp. 2d at 563 ("Generally, the law of the flag and the defendant shipowner's base of operations weigh most heavily in the determination." (citing *Lauritzen*, 345 U.S. at 583)).

Nevertheless, we had the opportunity to apply the *Lauritzen* analysis to a purely domestic tort action in *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1968). In *Scott*, an airplane bound for Atlanta -- with a layover in Philadelphia -- took off from Logan Airport in Boston only to crash into Boston Harbor shortly thereafter. See id. at 18-19. The survivors of one of the passengers on board that flight sued the airline in both tort and contract, and we determined, with respect to the tort issues, that the *Lauritzen* factors would govern whether Massachusetts or Pennsylvania law would apply. See id. at 25. We determined that the *Lauritzen* factors, viewed as a whole, represented a departure from the application -- in admiralty cases -- of the *lex loci delecti*[13] rule and a move toward analyzing which state had the most significant relationship to the incident and the dominant interest in having its law applied.[14] *See id.* at 28-29.

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[13]The *lex loci delecti* doctrine requires courts to apply the law of the state in which the tort occurred. *See Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796, 805 (Pa. 1964).

[14]The "most significant relationship" analysis is that which has been advocated by the American Law Institute's Second Restatement on Conflicts of Law. *See Restatement (Second) of Conflicts of Law* § 145 (1971). As we explained in Scott, the Restatement itself had cited *Lauritzen* as an example of the "most significant relationship" standard. *See Scott*, 399

We held that because the crash that occurred in Boston Harbor was purely fortuitous or adventitious, Massachusetts had a very limited relationship to the accident that gave rise to the cause of action and therefore had little interest in having its law applied. *See id.* at 28. On the other hand, because Pennsylvania was the decedent's domicile, the situs of his ticket purchase, and the administration of his estate, Pennsylvania had the most significant relationship to the action, as well as the dominant interest in having its law applied. *See id.*

The Calhouns argue that because Natalie did not intend for the WaveJammer she was operating to lose control, the fact that she was killed in Puerto Rico was just as fortuitous as the incident that occurred in *Scott*, and that therefore Puerto Rico has little, if any, relationship to the accident and little interest in having its law applied. We disagree. If we were to accept the Calhouns' interpretation of the *Scott* court's concept of fortuity, virtually every accidental injury would qualify as "fortuitous," thus diluting to the point of extinction any application of the law of the state in which an injury or death occurred. Although we agree that the Supreme Court has expressed a dislike for a rote application of the *lex loci delecti* doctrine, we believe that the Court intended a rule that balanced, rather than displaced, the various states' interests.

The airplane in *Scott* could have crashed anywhere -- Boston Harbor, the Hudson River, or Long Island Sound -- it

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F.2d at 28 n.9 (citing Restatement (Second) of Conflict of Laws, § 145 Reporter's Note at 20 (Proposed Official Draft, Part II, 1971)). The Second Restatement includes, as a relevant part of this analysis, an inquiry into which state has the dominant interest in having its law applied. *See Restatement* (Second) of Conflicts of Law § 145 cmt. b.

was merely chance that the plane went down in the territorial waters off the coast of Massachusetts, as opposed to, for instance, New York or New Jersey. Here, however, Natalie *intentionally* traveled to Puerto Rico and *intentionally* operated the WaveJammer in Puerto Rico's territorial waters. This being so, there was *no* possibility that Natalie's accident could have occurred anywhere other than in Puerto Rico.

Courts within this Circuit have held that the concept of "fortuitous injury" cannot be invoked in an effort to avoid application of the law of state in which the injury occurred when the injured (or deceased) intentionally traveled to the location of the accident. *See, e.g., Tonkon v. Denny's, Inc.*, 650 F. Supp. 119, 121 (E.D. Pa. 1986) ("When a party voluntarily and intentionally travels to another state, the location of an injury incurred there is not fortuitous." (citing *Blakesley v. Wolford*, 789 F.2d 236, 239 (3d Cir. 1986)). We have held that once a court classifies an activity or accident as *non*-fortuitous in nature," 'the place of the injury assumes much more importance, and in some instances may be determinative.' " *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1072 (3d Cir. 1996) (quoting *Shuder v. McDonald's Corp.*, 859 F.2d 266, 272 (3d Cir. 1988)); *Shields v. Consolidated Rail Corp.*, 810 F.2d 397, 401 (3d Cir. 1987)).

Here, as we have related, Natalie voluntarily traveled to Puerto Rico and boarded, as well as operated, the WaveJammer that ultimately caused her death. The sole relationship that Pennsylvania enjoys with this incident is that the Calhouns -- and Natalie prior to her death -- were Pennsylvania domiciliaries, as well as the fact that Natalie's estate will be administered in Pennsylvania. Although these ties are certainly relevant, they do not outweigh the more prominent relationship that Puerto Rico, as the situs of the injury, has with this litigation. These principles

therefore counsel in favor of the application of the law of Puerto Rico on the issue of both compensatory and punitive damages.

As stated above, however, we must also inquire into which state has the most dominant interest in having its law applied to this litigation. Viewed in this manner, and through the lens of the depecage doctrine, both Pennsylvania and Puerto Rico each have significant interests in having its respective law applied to the different types of damages that the Calhouns seek through their complaint.

The purpose of *compensatory* damages is "to make the plaintiff whole." *Feingold v. SEPTA*, 512 Pa. 567, 517 A.2d 1270, 1276 (Pa. 1986); *see also Saldana Sanchez v. Vega Sosa*, 175 F.3d 35, 36 (1st Cir. 1999). Given that the individuals who seek to be made whole -- the Calhouns and Natalie's estate -- are all Pennsylvania domiciliaries, it appears as if Pennsylvania has a strong interest in having its law of compensatory damages apply to the present matter. Further, it is hard to dispute that Pennsylvania has a substantial interest in obtaining compensation for its citizens in order to remedy wrongs that have been committed against such individuals. *See, e.g., Blakesley*, 789 F.2d at 242 n.11. That interest, however, does not obtain insofar as Puerto Rico is concerned, as the Calhouns have virtually no connection to Puerto Rico. Accordingly, Puerto Rico would have very little interest in either making the Calhouns whole or remedying wrongs that Yamaha may have committed against them.

Punitive damages, on the other hand, are intended to punish wrongdoers and deter future conduct. *See, e.g., Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800, 803 (Pa. 1989); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2081 (1999) (quoting a jury instruction

regarding punitive damages as stating "the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeating such wrongful acts"). Although Pennsylvania has an interest in punishing those who harm their citizens, we are persuaded that Puerto Rico's interest in regulating the activity that occurs in its territorial waters-- whether commercial or recreational -- is more dominant. Indeed, the tragic death that befell Natalie easily could have been visited upon a Puerto Rican citizen. *Cf.* Puerto Rico Act No. 48 (1986) ("The State ... must be watchful for the owners of vessels, sailors, and water skiers to also be prudent in their enjoyment and practice of their recreational activities, for their benefit and that of the bathers."). Puerto Rico also has an especially strong interest in maintaining the safety of the waterways surrounding the island to preserve the economic benefits it derives from both tourism and other commercial enterprises.[15]

As a result, we hold that the District Court did not err in ruling that it would apply the law of Pennsylvania in the determination of compensatory damages and the law of Puerto Rico in the determination of punitive damages.

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[15]The Calhouns argue that Puerto Rico cannot have a dominant interest in the application of its law on punitive damages because Puerto Rico has rejected the use of punitive damages as a deterrent measure. Such an argument, however, miscomprehends the nature of our inquiry. The appropriate question is not whether Puerto Rico's specific interest in the application of its law on punitive damages is dominant as compared to Pennsylvania's, but rather, whether the *state* in which the injury occurred has a dominant interest in the application of its law on punitive damages as compared to the state of the plaintiff's domicile.

IV

The District Court also ruled that state law -- specifically, the law of Puerto Rico -- would be applied in order to determine whether Yamaha was substantively liable for Natalie's death. As earlier noted, the District Court's interlocutory order asked us to answer the following:

> 3. Did [the District Court] err in deciding, on remand, that the jurisdiction whose substantive liability law is the source of the Calhouns' claims is Puerto Rico?

Calhoun, 40 F. Supp. 2d at 298.[16] We hold that the answer given by the District Court, that the law of Puerto Rico would

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[16]This issue is more than a merely academic exercise. As counsel for the Calhouns indicated at oral argument, Pennsylvania law would bar any attempt by Yamaha, under a comparative negligence theory, to introduce evidence of Natalie's negligence in operating the WaveJammer in order to limit its own liability. *See Frey v. Harley Davidson Motor Co.*, 734 A.2d 1, 10 (Pa. Super. Ct. 1999) ("The general rule [is] that contributory and comparative negligence are not defenses to a strict products liability action."), *appeal denied*, 751 A.2d 191, 2000 WL 60053 (Pa. 2000); *Jara v. Rexworks, Inc.*, 718 A.2d 788, 793 (Pa. Super. Ct. 1998). On the other hand, a plaintiff's comparative negligence is a proper defense to a cause of action sounding in admiralty. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, (1975) ("We hold that when two or more parties have contributed by their fault to cause property damage ... damages [are] to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."); *see also Farr v. NC Mach. Co.*, 186 F.3d 1165, 1167 (9th Cir. 1999); *In re: Sincere Navigation Corp.*, 529 F.2d 744 (5th Cir. 1976).

govern, was erroneous. Our holding to this effect obliges us to reverse that part of the District Court's order.

The answer to the District Court's question revolves around the proper interpretation of a number of Supreme Court opinions concluding with the Court's opinion in the instant matter. Prior to 1970, actions for wrongful death in admiralty were governed by the Supreme Court's decision, during the Court's 1886 term, in *The Harrisburg*, 119 U.S. 199, (1886). In *The Harrisburg*, the Court held that because Congress had not seen fit to provide a cause of action for wrongful death in admiralty cases, it would be inappropriate for the federal courts to create such a cause of action from federal common law. *See id.* at 213. In so ruling, the Court stated that "the rights of persons in this particular [action] under the maritime law of this country are not different from those under the common law, and [ ] it is the duty of courts to declare the law, not to make it." *Id.* at 213-14. The Court's holding in *The Harrisburg* therefore forced plaintiffs such as the Calhouns to rely exclusively upon *state* causes of action if they sought to obtain a remedy for an allegedly wrongful death in United States territorial waters.

After *The Harrisburg*, a trilogy of Supreme Court opinions decided between 1959 and 1960 informed lower courts that when exercising their admiralty jurisdiction, they were required to apply *state* law completely -- with respect to both procedural and substantive issues. *See Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960); *Hess v. United States*, 361 U.S. 314 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). Representative of this trilogy was *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), in which the Court held that

> decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with

> whatever conditions and limitations the creating State has attached.

Id. at 592. Importantly, the Court in *The Tungus* expressly based this language upon its holding in *The Harrisburg*. *See id.* Because no federal statute provided a cause of action for wrongful death in territorial waters, *The Harrisburg* and *The Tungus* suggested that courts entertaining such causes of action were to apply *state* law liability standards. Indeed, the Court explicitly held in *Hess v. United States*, 361 U.S. 314 (1960), that "in an action for wrongful death in state territorial waters, the conduct said to give rise to liability is to be measured not under admiralty's standards of action, but under the substantive standards of the state law." *Id.* at 319.

This principle, through which the states remained a virtually equal participant in regulating the means by which an individual could obtain relief for another's death on the water, seemingly changed as a result of the Supreme Court's opinion in *Moragne v. United Marine Lines, Inc.*, 398 U.S. 375 (1970). In *Moragne*, the Court overruled *The Harrisburg* and *created* a federal cause of action under the federal common law for wrongful death to provide a remedy for survivors of *seamen* killed in territorial waters. *See id.* at 409. Indeed, The *Moragne* Court stated that the rule adopted in *The Harrisburg* "had little justification except in primitive English legal history -- a history far removed from the American law of remedies for maritime deaths." *Id.* at 379.

The *Moragne* Court did not, however, expressly overrule the trilogy of *The Tungus, Hess, and Goett*. Rather, the Court stated that the genesis of the jurisprudential nightmare that resulted in the Court's holding in *Moragne* could be found in *The Harrisburg*, not *The Tungus*. *See id.* at 378 ("We have concluded that the primary source of the confusion is not to be

found in *The Tungus*, but in *The Harrisburg* ...."). Although the Court declined to overrule *The Tungus* expressly, we could argue, were it not for subsequent expressions of our Court and the Supreme Court itself, that with the demise of *The Harrisburg*, the Court similarly relegated, *sub silentio*, opinions such as *The Tungus, Hess*, and *Goett* to the jurisprudential scrap heap of history, insofar as such rulings were expressly based upon *The Harrisburg*. As the District Court recognized, this was also the position taken by most admiralty commentators prior to the institution of this litigation. *See, e.g.*, 2 Richard Ziade, *Benedict on Admiralty*, § 81e, at 7-17 n. 59 (7th ed. 1999); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 6-32, at 367 (2d ed. 1975).

The earlier opinions of both our Court and the Supreme Court in the Calhoun/Yamaha controversy to which we have previously referred, however, appear to imply otherwise. Indeed, in our previous *Calhoun* opinion, we observed that the portion of *The Tungus* that suggested that the ability of a non-seaman to obtain relief for injury or death occurring in state territorial waters depended on state statutory law "retained vitality post-*Moragne*." *Calhoun*, 40 F.3d at 641 n.39. The Supreme Court echoed our reasoning. *See Yamaha*, 516 U.S. at 212. The question therefore becomes whether these statements have revived the principle for which *The Tungus* has become most known -- a court hearing an action in which a party is using a state wrongful death statute to institute an action in admiralty must apply state law to all issues presented. The District Court answered this question in the affirmative, reasoning that "in this Circuit, *The Tungus*, with all its *Harrisburg*-era warts, remains good law with respect to the proposition that 'rights of non-seaman [sic] killed in state territorial waters depend on [**35] state wrongful death statute.' " *Calhoun*, 40 F. Supp. 2d at 295. From this principle,

the District Court extrapolated that "the substantive rights of those suing derivatively from, or in the name of, nonseafarers killed in the territorial waters of a state have their source in state law." *Id.*

We respectfully disagree. We believe that *The Tungus* remains good law only with respect to its broader proposition concerning the role that state regulation may play in the admiralty arena. The Supreme Court has lent credence to this broader proposition by authorizing the Calhouns' use of Pennsylvania's wrongful death/survival statute only as the *vehicle* through which they may prosecute their action. The more specific holding of *The Tungus*, however -- that federal courts must apply all facets of state law when a plaintiff seeks to proceed by way of a cause of action grounded in state law -- was effectively overruled in *Moragne* once the Court invalidated the reasoning advanced by the Court in *The Harrisburg*. *The Tungus*'s emphasis on the usage of the particulars of state law was specifically trained on the fact that federal law (both statutory and common law) did not provide a cause of action for wrongful death on the water. This was the very precept that was universally struck down in *Moragne*, through which the Supreme Court *created* such a cause of action. As such, *The Tungus*'s remaining vitality rests only upon the limited proposition announced by the Supreme Court earlier in this very litigation -- that state law may provide a procedure or a vehicle through which a plaintiff may institute an action to remedy death in territorial waters.

The District Court's holding also failed to take account of the prevailing policy that has guided the advancement of federal admiralty law and regulation: uniformity. Creating a uniform system by which activities and events on the waters of the United States would be adjudicated was such a matter of concern to the Framers that they placed admiralty as among the

powers of the newly-created federal government. *See* U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "to define and punish Piracies and Felonies committed on the high seas"). The Supreme Court addressed the importance of uniformity in the maritime arena in *Richardson*: "The federal interest in protecting maritime commerce ... can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct ...." *Richardson*, 457 U.S. at 674-75; *see also Sisson*, 497 U.S. at 367 ("The need for uniform rules of maritime conduct and liability is not limited to navigation, but expands at least to any other activities traditionally undertaken by vessels.").

Uniformity, as Yamaha forcefully argues, is a rather strong concern in the instant matter. If we were to adopt the District Court's holding that the substantive standards by which an admiralty defendant's liability is adjudged is governed by the law of the state in which the alleged injury occurred, there would be no uniformity in such standards. *Cf. Ellis v. Riverport Enterprises, Inc.*, 957 F. Supp. 105, 106 (E.D. Ky. 1997) (stating that " 'principles of federalism counsel that only when the federal interest in uniformity outweighs other interests at stake should admiralty jurisdiction deprive the state of its traditional control over personal injury claims.' "). Indeed, such uniformity concerns informed the *Moragne* Court's decision to overrule *The Harrisburg*. *See Moragne*, 398 U.S. at 401 ("Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to *exclusively* maritime substantive concepts." (emphasis added)).

Accordingly, we hold that federal maritime standards govern the adjudication of a defendant's (here, Yamaha's)

putative liability in an admiralty action brought pursuant to a state wrongful death/survival statute.[17]

V

We conclude by summarizing our answers to the certified questions:

1. Should punitive damages be determined by the law of Puerto Rico? We have answered "yes," and in so doing, we affirm the order of partial summary judgment entered by the District Court on March 22, 1999.

2. Should compensatory damages be determined by the law of Pennsylvania? We have answered "yes," and in so doing, we affirm the order of partial summary judgment entered by the District Court on March 22, 1999.

3. Is the law of Puerto Rico to be applied to determine the

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[17]We note that we are not alone in setting forth the above reasoning in the wake of the Supreme Court's ruling in the instant matter. Indeed, the Southern District of New York has held that

> the thrust of *Yamaha* [516 U.S. 199] is to argue that considerations of uniformity in federal maritime wrongful death action require only that standards of *liability* be exclusively determined by federal maritime law and that, once such liability has been shown, there is no antagonism to such a policy in supplementing federal remedies with those available under otherwise applicable state statutes.

O'Hara v. Celebrity Cruises Lines, Inc., 979 F. Supp. 254, 256 (S.D.N.Y. 1997). The *O'Hare* court termed any indication in *Yamaha* to the contrary as "Delphic." *See id.* at 256 n.1.

liability of Yamaha? We have answered "no," and in so doing, we reverse this portion of the order entered by the District Court on March 22, 1999, and remand this matter to the District Court for further proceedings consistent with this opinion.

Each party will bear its own costs.

NYGAARD, J., *concurring and dissenting*.

I take little issue with most of the majority's carefully crafted opinion. I do, however, respectfully part ways with its choice of Puerto Rican law, and conclusion that the Estate of Natalie K. Calhoun should be denied punitive damages.

As the majority correctly points out, a federal court sitting in diversity applies the forum state's choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). This requires that we weigh the interests of the jurisdictions involved and consider how these interests are related to the specific issues involved in the conflict. *See Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

Contacts considered vital in determining the state of most significant relationship include: place of injury, place of conduct, domicile of the parties, and the place where the relationship between the parties is centered. *See* Restatement (Second) of Conflict of Laws §145(2) (1971). The importance of the respective contacts is determined, in part, by considering the issues, the nature of the tort, and the purposes of the tort rules involved. *Id.* at §145 (comments c-f).

The District Court relied exclusively on the fact that Puerto Rico does not provide punitive damages as part of its damages scheme:

> [The] purposes [of punitive damages] appear to be the community purposes of the state or community in which the tortious activity takes place. The fact that Puerto Rico does not have a regime of punitive damages reflects a community determination that Puerto Rico for its reasons does not think that punitive damages are the instrument ... through which it wishes to pursue ... punishment on the one hand and deterrence on the other.

Calhoun v. Yamaha Motor Corp., 40 F. Supp. 2d 288, 291 (E.D. Pa. 1999).

The District Court further opined that since the chief purposes of punitive damages are to deter and punish, rather than compensate the victims, the public policy of Puerto Rico, a Commonwealth that has elected not to employ punitive damages as an instrument of deterrence and punishment, should govern as to this aspect of damages, instead of the public policy of Pennsylvania. *See id.*; *see also Calhoun v. Yamaha Motor Corp.*, 1998 WL 717430 (E.D. Pa. 1998). However, under the modern interest-analysis conflict of laws approach that is followed by the majority of states including Pennsylvania, the law of the state with the *greatest interest* in furthering the public policy behind its punitive damages scheme should govern.

Puerto Rico has little interest in the outcome here. In contrast, Pennsylvania's interest in the amount of recovery in wrongful death cases is great. The Constitution of Pennsylvania, Article III, Section 21 P.S. (*cited in Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796, 807 (Pa. 1964)) states:

> The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment ***; *but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive* ***. (emphasis added).

Punitive damages are appropriate in Pennsylvania when the act committed, in addition to causing actual damages, constitutes "outrageous conduct," either through reckless

indifference or bad motive. *See McClellan v. Health Maintenance Org. of Pennsylvania*, 604 A.2d 1053, 1061 (Pa. Super. 1992); *see also Feld v. Merriam*, 485 A.2d 742, 747-48 (Pa. 1984). We have held that three factors should be considered when awarding punitive damages: (1) the character of the act; (2) the nature and extent of the harm caused; and (3) the wealth of the defendant. *See Donaldson v. Bernstein*, 104 F.3d 547, 557 (3d Cir. 1997)(*citing Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800, 803 (Pa. 1989)). *See also* Restatement (Second) of Torts § 908(2) (regarding imposition of punitive damages adopted in Pennsylvania).

Here, the defendant, *a Japanese corporation*, (tortious actor) defectively manufactured a jet ski *in Japan* (character of act), the tortious act resulted in the death of *a Pennsylvania resident* while riding the defective jet ski (extent of harm caused), and the defendant is a very large multi-national corporation (wealth of the defendant). These factors indicate Pennsylvania's interest in awarding punitive damages to the Calhouns. They also evince Puerto Rico's little interest in the outcome of the lawsuit. The fatal accident did not occur to a Puerto Rican citizen, the plaintiff is not Puerto Rican, the outrageous conduct was not committed by a Puerto Rican, and the only connection Puerto Rico has is that the accident happened to have occurred there. The District Court's reliance on the "community purposes of the state in which the tortious activity took place" is misplaced, because the "tortious activity" at issue in this case -- the allegedly defective design and manufacture of the jet ski -- did not occur in Puerto Rico. Rather, the jet ski was designed and manufactured by a Japanese corporation in Japan.

The Supreme Court has held that punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. *See*

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). By my analysis, Pennsylvania has a more legitimate interest in getting the punitive damages awarded for the wrongful death of one of its residents than Puerto Rico has in protecting one of its citizens from an excessive verdict by precluding the award of punitive damages.

The Pennsylvania Supreme Court has held that compensation of an injured plaintiff is primarily a concern of the state in which the plaintiff is domiciled. *Griffith*, 203 A.2d at 806. The only interest of the state of injury would be in the compensation of those who rendered medical aid and other assistance to the injured parties. *Id.* Where, as here, immediate death occurs, the state has no such interest. *Id.* at 807. Thus, under Pennsylvania law, Puerto Rico has no interest in the compensation of this decedent's estate. Pennsylvania, on the other hand, has a very strong interest in seeing that one of its residents is compensated under a wrongful death claim, and that an outrageous and tortious act be punished to deter the defendant from continuing its behavior.

In my view, this result is consistent with *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 393 U.S. 979 (1968). In *Scott*, the following contacts were crucial to our decision: the decedent was domiciled in Pennsylvania; the letters of administration were granted by the Register of Wills of Philadelphia County; the decedent's personal property was located in Pennsylvania; the decedent's relationship with the defendant began in Pennsylvania, and the defendant did business in Pennsylvania. *See* 399 F.2d at 22.

The facts in *Scott* are very similar to the facts here: (1) the decedent in *Scott* was in Boston voluntarily and Natalie was in Puerto Rico voluntarily; (2) the decedent in *Scott* got on a plane in Boston voluntarily and Natalie got on the jet-ski in

Puerto Rico voluntarily; (3) the decedent in *Scott* was killed in Boston and Natalie was killed in Puerto Rico; (4) the decedent in *Scott* was a Pennsylvania resident as was Natalie; and (5) the decedent's estate in *Scott* was settled in Pennsylvania, Natalie's estate is to be settled in Pennsylvania, and Yamaha does business in Pennsylvania, including advertising and distributing its products. In contrast, Puerto Rico's sole contact with the incident in question is that Natalie's death occurred in its territorial waters. Thus, under the *ratio decidendi* of *Scott*, Puerto Rico (like Massachusetts in *Scott*), the state where the accident occurred, has no interest in the outcome of the litigation.

In *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069 (3d Cir. 1996), a Pennsylvania resident was injured at his regular workplace in Delaware. In *LeJeune* the cornerstone of our conclusion that Delaware was not a fortuitous place of injury, was the fixed location of the plaintiff's workplace, the regularity of his presence there, and the fact that the majority of the wrongful conduct occurred in Delaware. Neither *Scott* nor *LeJeune* defines the concept of fortuity. However, as the Calhouns argue and I agree, Natalie's brief vacation in Puerto Rico is more akin to that of the plaintiff in *Scott* than to the status of the plaintiff in *LeJeune* who came to Delaware every day to work.

Other Circuits provide some guidance. In airplane crash cases, for example, the place of injury is much more fortuitous than the place the defendant selects as his place of incorporation and principal place of business or the place of misconduct. In *In re Air Crash Near Chicago*, 644 F.2d 594, 615 (7th Cir. 1981); *cert. denied*, 454 U.S. 878 (1981), the court held that the state where an injury occurs has less interest in deterrence and less ability to control behavior by deterrence or punishment than the state where the plaintiff is domiciled or the state where the

misconduct occurred. In *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731 (1st Cir. 1994), the court applied Rhode Island law to govern a products liability action brought by an army mechanic stationed in Colorado against Honda in his home state of Rhode Island for injuries sustained in Colorado while operating a vehicle designed and manufactured by Honda. In rejecting the law of the place of injury, the *La Plante* court gave significant weight to the fact that the tortious conduct that gave rise to the plaintiff 's claim occurred not in Colorado, but in Japan, where the car was designed. *Id.* at 741.

In *Villaman v. Schee*, 1994 WL 6661 at *4 (9th Cir. 1994), the court held that because Arizona tort law was designed in part to deter negligent conduct within its borders, Arizona had a stronger interest in the application of its laws allowing for full compensatory and punitive damages than Mexico did, whose limitation of tort damages, like Puerto Rico's, was designed to protect its residents "from excessive financial burdens or exaggerated claims." If the defendants in this case were Puerto Rican residents, then Puerto Rico's interest in protecting its residents from excessive financial burdens might be somewhat compelling. However, Puerto Rico has no resident to protect and I conclude it has no interest in denying either punishment or full recovery to non-residents.

Although punitive damages may be the medium of deterrence, the result and purpose of punitive damages is to protect citizens. I would hold that the District Court erred by concluding that the Calhouns' punitive damages claim is governed by Puerto Rico law.

Lucien B. CALHOUN and Robin Calhoun, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased

v.

YAMAHA MOTOR CORPORATION, USA and Yamaha Motor Company, Ltd.

Civil Action No. 90-4295

United States District Court
E.D. Pennsylvania

March 19, 1999, Decided.

William J. Taylor, Saul, Ewing, Remick & Saul LLP, Philadelphia, PA, for Lucien B. Calhoun, Robin L. Calhoun, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased, Plaintiffs.

Jonathan Dryer, Wilson, Elser, Moskowitz, Edelman & Dicker, William R. Hoffman, Wilson, Elser, Moskowitz, Edelman & Dicker, Philadelphia, PA, for Yamaha Motor Corporation, U.S.A., Yamaha Motor Co., Ltd., ABC Corporations, XYZ Partnerships, Defendants.

OPINION

POLLACK, District Judge.

This case arises from the tragic death, in the offshore waters of Puerto Rico, of Natalie Calhoun, the minor daughter of Lucien B. Calhoun and Robin L. Calhoun. In the summer of 1989, Natalie, twelve, who lived with her parents in Pennsylvania, went on a vacation trip to Puerto Rico with a friend and her friend's parents. During their stay at a resort hotel, Natalie rented a "Wavejammer" jet ski. The Wavejammer hit a vessel at anchor near the beach. Natalie was killed.

Invoking Pennsylvania law, Natalie's parents brought a combined wrongful death and survival action in this court against Yamaha Motor Company, Ltd., a Japanese corporation, which is the manufacturer of Wavejammer jet skis, and Yamaha Motor Corporation, U.S.A., a California corporation, which is the American distributor of Wavejammers. (The defendants are hereinafter collectively referred to as "Yamaha"). The complaint alleged defects in the Wavejammer, and attributed liability to Yamaha on the basis of negligence, strict liability, and breach of implied warranties of merchantability and fitness.

Plaintiffs contended that, since the parties were of diverse citizenship, the suit should be treated as a conventional diversity action, to be tried under Pennsylvania law in conformity with the requirements of the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Klaxon v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Yamaha contended that, since the suit arose from an accident occurring in the territorial waters of the United States, the suit should, notwithstanding that Natalie was neither a seaman nor a

longshoreman (i.e., notwithstanding that she was not a "seafarer"), be regarded as embraced by this court's admiralty jurisdiction. More particularly, Yamaha contended that the suit should, pursuant to *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970), be treated as a federal maritime claim. I concluded that Yamaha was correct in arguing that the Calhouns' suit sounded not in diversity but in admiralty. Pursuant to that jurisdictional ruling, I undertook to fashion the cognizable damages claims in conformity with what I determined to be appropriate and uniform federal maritime standards. Specifically, I determined that–contrary to Yamaha's view–the Calhouns could undertake to sue for loss of Natalie's society, but–contrary to the Calhouns' view–they could not sue for Natalie's lost future earnings or for punitive damages. 1993 WL 216238, 1993 U.S. Dist. LEXIS 8267 (E.D.Pa. 1993). At the instance of the parties, these rulings were certified for interlocutory review, pursuant to 28 U.S.C. § 1292(b).

The Court of Appeals, in a detailed and closely reasoned opinion, reversed, 40 F.3d 622 (3d Cir. 1994). Concluding that this court had misconstrued *Moragne* and other pertinent Supreme Court decisions in holding that a uniform federal remedial regime was intended to govern litigation arising out of allegedly tortious deaths of nonseafarers in territorial waters, the Court of Appeals ruled that state remedial law was to govern the Calhouns' suit against Yamaha. However, the Court of Appeals left it to this court to determine, in the first instance, the choice-of-law question of which jurisdiction's–i.e., Pennsylvania's or Puerto Rico's–remedial regime should apply.

The Supreme Court, on certiorari, affirmed in a unanimous opinion. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 2d 578 (1996). After reviewing its own major cases, including *Moragne*, and after

careful analysis of the interplay between its cases and three major federal statutes–the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*; the Jones Act, 46 U.S.C. § 688 *et seq.*; and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*–the Court ruled that "taking into account what Congress sought to achieve, we preserve the application of state statutes to deaths within territorial waters." *Id.* at 216. Then, said the Court, in the final paragraphs of the opinion, "for the reasons stated, we hold that the damages available for the jet ski death of Natalie Calhoun are properly governed by state law." *Id.*

The Court, in the opinion's closing footnote, pointed out that "the Third Circuit left for initial consideration by the District Court whether Pennsylvania's wrongful-death remedies or Puerto Rico's apply." *Id.* at 216 n.14

The opinion's closing footnote also identified a related question whose disposition the Supreme Court–like the Court of Appeals–felt could be deferred (*id.*):

> The Court of Appeals also left open, as do we, the source–federal or state–of the standards governing liability, as distinguished from the rules on remedies. We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law has held sway. Compare *Kermarec*, 358 U.S. 625 at 628 [, 79 S.Ct. 406] (personal injury); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409[, 74 S.Ct. 202, 98 L.Ed. 143] (1953) (same), with *Hess v. United States*, 361 U.S. 314, 319[, 80 S.Ct. 341,4 L.Ed.2d 305] (1960) (wrongful death); *The Tungus v. Skovgaard*, 358 U.S.

588, 592-594[, 79 S.Ct. 503, 3 L.ED.2d 524] (1959) (same).

II.

As the foregoing recital explains, two questions were remitted to this court by the Court of Appeals and the Supreme Court. The first question is which jurisdiction's remedial regime–that prescribed by the law of remedies of Puerto Rico or that prescribed by the law of remedies of Pennsylvania–frames the damages claims advanced by the Calhouns. The second question is whether the source of the Calhouns' substantive claims is federal maritime law or state law. If the second question yields the answer that state substantive law governs, a further question is presented: Is the applicable substantive law that of Pennsylvania (the home jurisdiction of Natalie Calhoun and of her parents, and the jurisdiction in which this litigation is being conducted), or that of Puerto Rico (the jurisdiction in which Natalie's tragic death occurred).[1]

The first of these questions was addressed by this court last fall. After briefing and argument I announced a provisional ruling–"provisional" in the sense that it was not then embodied

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[1]The term "state law" is here used to denote the law of Puerto Rico as well as the law of Pennsylvania, notwithstanding that Puerto Rico is, as a matter of formal federal terminology, a "commonwealth" rather than a "state." (Pennsylvania's formal self-description as the "Commonwealth of Pennsylvania," in the Preamble of the Pennsylvania Constitution, is deeply rooted in Pennsylvania's history, but it is, of course, a matter of local terminology which in no respect modifies or qualifies Pennsylvania's status as a "state" for all federal purposes.)

in an order. See Transcript of Oral Argument, Sept. 23, 1998. At a subsequent hearing a week later I stated that, after giving counsel the opportunity to file supplemental briefs, I would (1) reconsider my provisional ruling (a ruling which, as I explain below, was at odds with the position of the Calhouns and with the position of Yamaha) on the question of remedies and (2) rule on the question whether the Calhouns' claims are substantively rooted in federal maritime law or state law. Further, I expressed agreement with the joint view of the parties that my rulings on these two questions (whatever those rulings turned out to be) should be certified to the Court of Appeals pursuant to 28 U.S.C. § 1292(b).

i.

My provisional decision on the question of the applicability of Pennsylvania's or Puerto Rico's remedial regime commenced with a ruling that the question was not one to be decided, *Klaxon*-wise, by reference to which jurisdiction's remedial provisions would be applied by a Pennsylvania Court of Common Pleas invoking principles of Pennsylvania conflict of laws. Because this case is deemed an admiralty case, not a diversity case, the question of whose remedial regime should be applied was, in my view, a question of federal choice-of-law law, not of state choice-of-law law. It seemed to me that for this court to be guided by how a Pennsylvania tort case involving (a) cognate claims and (b) parties of similarly diverse citizenship would be handled by a Pennsylvania Court of Common Pleas would be an invitation to a species of disuniformity in the management of maritime death claims that the Supreme Court and the Court of Appeals could hardly have intended, since it would mean that, if a case identical to this were brought in a federal district court in Puerto Rico, the question of what remedies were available would depend on Puerto Rico's choice-

of-law rules which might well not be harmonious with Pennsylvania's choice-of-law rules.

In sum, I decided that whether Puerto Rico's or Pennsylvania's remedial rules should govern was a matter of federal choice of law which it was up to me to determine.

With respect to the Calhouns' claim for punitive damages, I concluded that such a claim was not cognizable in this case because Puerto Rico does not have punitive damages as part of its conventional damages arsenal. Punitive damages, I noted (Transcript, Sept. 23, 1998, pp. 35-39), are:

> intended to punish an egregious wrongdoer [and] are also intended to deter that wrongdoer and others from engaging in the grievously tortious conduct that is at issue. These two purposes appear to me to be the community purposes of the state or community in which the tortious activity takes place. The fact that Puerto Rico does not have a regime of punitive damages reflects a community determination that Puerto Rico for its reasons does not think that punitive damages are the instrument ... through which it wishes to pursue ... punishment on the one hand and deterrence on the other....

In reaching this result I rejected the contention of the Calhouns' counsel that the Puerto Rico situs of Natalie Calhoun's death was "adventitious," and hence should be disregarded for choice-of-law purposes–"adventitious" in the sense that, in *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14, 28 (3d Cir. 1968), the fact that the airplane crash in which Pennsylvania domiciliary Thomas L. Moody lost his life occurred in Boston Harbor was deemed by the en banc Third

Circuit to be "adventitious" and hence not to be given choice-of-law weight. "Puerto Rico in our case," I said, "was not a place of happenstance, it was a place to which Natalie Calhoun and her [friend] and [her] friend's parents had gone for a number of days of holiday. If there was tortious activity on the part of the defendants, that activity reached its consummation in Puerto Rico at the time of Natalie Calhoun's very tragic demise." Transcript, Sept. 23, 1998, pp. 39-40.

Having determined that Puerto Rico's interest should govern on the question of punitive damages, I came to a contrary view on the question of compensatory damages (Transcript, Sept. 23, 1998, p. 41):

> It is Pennsylvania that must care for the Calhoun family in their loss and must afford what compensation is appropriate for the estate of Natalie Calhoun. These are matters of much more limited concern to Puerto Rico.

Subsequent to my provisional ruling the parties have rebriefed the question. But the rebriefing has not materially altered the terms of debate.[2] I adhere to the view that the Calhouns, at the

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[2](A) Yamaha relies on *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), as strengthening its argument that the remedial law of Puerto Rico should govern not only as to punitive damages but also as to compensatory damages. But the case at bar is a far cry from *Lauritzen v. Larsen*, which determined that Danish law, rather than the Jones Act, should govern the liability of the Danish owner of a ship of Danish registry to a Danish crew member injured in the harbor of Havana. Larsen, the plaintiff, signed the ship's articles in New

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York where he subsequently brought suit; the ship's articles stipulated that Danish law governed the crew members' rights.

(B) Equally remote is *LaPlante v. American Honda Motor Co., Inc.*, 27 F.3d 731 (1st Cir. 1994), relied upon by the Calhouns to bolster their contention that all aspects of damages should be governed by Pennsylvania law. In *LaPlante*, a diversity case, the First Circuit concluded that a Rhode Island court would have applied Rhode Island's pain-and-suffering regime, rather than the less generous Colorado pain-and-suffering regime, in a catastrophic personal injury action arising out of an accident on a Honda "all-terrain vehicle"–more commonly known as an ATV–that befell a Rhode Island domiciliary in Colorado. That aspect of *LaPlante* is, of course, consonant with the Calhouns' view–in which I concur–that Pennsylvania's compensatory rules should govern the Calhouns' claims. However, when one examines the other aspects of LaPlante that the Calhouns rely on, there turns out to be, from the Calhouns' perspective, rather less in *LaPlante* than meets the eye:

The Calhouns argue that *LaPlante* supports their contention that Pennsylvania's punitive damages provisions should apply to the claims they are pressing in the case at bar. Although it is true that in *LaPlante* the district court followed Rhode Island law, not Colorado law, on punitive damages, the precise ruling of the district court, which the First Circuit sustained, was that the plaintiff had failed as a matter of law to establish a cognizable punitive damages claim; whether there was dispute as to the applicability, under Rhode Island choice-of-law law, of the Rhode Island punitive damages regime does not appear.

Finally, the Calhouns point to *LaPlante's* statement that "the

trial of their suit against Yamaha, may not seek punitive damages but may assert whatever claims for compensatory damages are available under Pennsylvania's law of remedies to plaintiffs in wrongful death and survival actions.

ii.

The foregoing determination of which jurisdiction's rules govern which items of damages addresses the first of the two problems identified by the Supreme Court in the final footnote of its *Yamaha* opinion. Next to be addressed is the second of the two problems: determining "the source–federal or state–of the standards governing liability, as distinguished from the rules on remedies." 516 U.S. at 216 n.14. In identifying this problem, the Court noted that it was "reserving for another day reconciliation of the maritime personal injury decisions that rejected state

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tortious conduct allegedly giving rise to plaintiff's injuries occurred in Japan, where the subject ATV was designed and its warnings devised," 27 F.3d at 741, in support of their argument that, in considering the availability of punitive damages, no weight should attach to the fact that Natalie Calhoun's fatal accident took place in Puerto Rico. One could, of course, fashion an argument that in some conceptual sense Yamaha's allegedly tortious conduct had its situs in Japan, or perhaps in Japan and California, but to say this would not appear to strengthen the Calhouns' contention that Pennsylvania's punitive damages regime should be preferred to Puerto Rico's lack of such a regime. The instructions of the Court of Appeals and the Supreme Court contemplate that this court is to look specifically to the remedial law of Pennsylvania and that of Puerto Rico in fashioning the applicable legal framework.

substantive liability standards, and the maritime wrongful-death cases in which state law has held sway." *Id.* The Court cited *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) and *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S. Ct. 202, 98 L. Ed. 143 (1953) as prototypes of the personal injury/rejection-of-state-law jurisprudence and *Hess v. United States*, 361 U.S. 314, 319, 80 S.Ct. 341, 4 L.Ed. 2d 305 (1960) and *The Tungus v. Skovgaard*, 358 U.S. 588, 592-594, 79 S.Ct. 503, 3 L.Ed. 2d 524 (1959) as prototypes of the wrongful death/adoption-of-state-law-jurisprudence.

For the purpose of deciding the issue now presented to this court, what must be considered is whether the Supreme Court has jettisoned the rule which in 1960, in its *per curiam* opinion in *Goett v. United Carbide Corp.*, 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed. 2d 341 (1960), the Court characterized as the holding in *The Tungus, supra*, decided less than a year before. According to *Goett*, *The Tungus* held that it is "a question of state law as to what is the proper substantive law to be applied in maritime torts within the territorial jurisdictions of the States in wrongful death cases." *Goett*, 361 U.S. at 342. The cursory opinion in *Hess v. United States, supra*, decided on the same day as *Goett*, was in accord.

As a conceptual matter, a determination that *The Tungus*, *Goett* and *Hess* are no longer good law–and, accordingly, that federal law defines the substantive rights of a claimant seeking redress for a death occurring in territorial waters–would appear to accomplish the reconciliation of personal injury and wrongful death cases adverted to by the Supreme Court in *Yamaha* as a doctrinal goal the Court looks

forward to achieving at some future time.[3] Moreover, such a determination would, on a verbal level, harmonize with the Court's ruling in *Moragne*, a case arising in the territorial waters of Florida which came to the Court ten years after *Goett and Hess*, and eleven years after The Tungus, "that an action does lie under general maritime law for death caused by violation of maritime duties." 398 U.S. at 409.[4]

In *Moragne*–decided in 1970–the Court recognized that a judge-made federal cause of action for wrongful death was required in order to provide equitable treatment for claimants in admiralty whose decedents had lost their lives within territorial waters, rather than on the high seas, and who were not adequately protected by the federal statutes covering those engaged in maritime occupations, or by state wrongful death

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[3]Yamaha is not the first occasion on which the Court has noted the tension between the doctrines applicable in personal injury and wrongful death cases arising in territorial waters. *See Moragne v. States Marine Lines*, 398 U.S. at 395. Cf., *The Tungus, supra*, 358 U.S. at 598 (opinion of Brennan, J., concurring and dissenting).

[4]Although "the Court's driving concern in Moragne" was to "achieve [] uniform access by seafarers to the unseaworthiness doctrine," *Yamaha*, 516 U.S. at 213 n. 10, the Court in Yamaha noted that "lower courts have held that Moragne's wrongful death action extends to nonseafarers," *id.* at 210 n. 7, and "we assume, for purposes of this decision, the correctness of that position. Similarly, as in prior encounters, we assume without deciding that Moragne also provides a survival action." *Id.* This court is bound by those assumptions as law of the case.

statutes.[5] To reach that proper conclusion, the Court expressly overturned *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), which had held that, in the absence of a statute establishing a cause of action for wrongful death, no such claim was cognizable in admiralty. *The Harrisburg* was an incubus that shadowed the law of admiralty for almost a century until it was repudiated by *Moragne* in 1970. *The Tungus* rests squarely on *The Harrisburg*. See *The Tungus*, 358 U.S. at 590-592. And so the question arises whether the demise of *The Harrisburg*, decreed in *Moragne*, necessarily entailed the demise of *The Tungus* (and its pallid twin offspring, *Goett* and *Hess*) as well.

Respected authority–the 1975 edition of the classic admiralty treatise written by Charles Black and the late Grant Gilmore–has answered the question in the affirmative: Moragne "overruled both The Harrisburg and The Tungus (and its sequels)...." *Grant Gilmore and Charles L. Black, Jr., The Law of Admiralty* (2d ed., 1975) 367.[6]

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[5]As pointed out in footnote 4, supra, the Supreme Court in Yamaha assumed, without deciding, that *Moragne*'s recognition of a wrongful death cause of action would also involve recognition of a survival action.

[6]It is fair to say that *The Tungus*, *Hess* and *Goett* are not decisions admired by Professors Gilmore and Black. The 1975 edition of the treatise, after describing the elaborate and arcane divisions of the Court in The Tungus (five-to-four) and *Hess* (six-to-three), says of *Goett* (five-to-three-to-one): "The Goett case, decided the same day as *Hess*, marked a descent into a still lower circle of the Court's private jurisprudential hell." *Gilmore Black, supra*, at 367.

However, in this fortieth anniversary year of *The Tungus*, it now appears that reports of the demise of *The Tungus* and its progeny have been exaggerated. "In the wake of *Calhoun [v. Yamaha]*," maritime lawyer Walter Johnson has written, "*The Tungus*, *Hess* and *Goett* have taken on new life." Walter Johnson, *Diving into the Wreck: An Exploration of Yamaha Motor Corp. v. Calhoun*, 9 U.S.F. Mar. L. J. 141, 157 (1996). Mr. Johnson builds his case for this doctrinal resurrection on the Supreme Court's Yamaha opinion, but the evidence Mr. Johnson relies on is somewhat ambiguous.[7] More

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The 1975 edition of Gilmore and Black was the second edition. The first edition was published in 1957. Lamentably, there has been no third edition.

[7]Citing footnote 10 of the Supreme Court's Yamaha opinion, Mr. Johnson notes that, "significantly, the Calhoun Court points out that Moragne could have overturned The Tungus but did not." Johnson, supra, at 157. But Mr. Johnson may have over-read the Yamaha footnote. What the first sentence of the footnote says, in commencing a discussion of the sweep of Moragne, is this: "The Court might have simply overruled The Tungus ... thus permitting plaintiffs to rely on federal liability standards to obtain state wrongful-death remedies," 516 U.S. at 213 n. 10. This language does not have to be read as signifying that Moragne did not overrule The Tungus. It may also be read as signifying that the Moragne Court could have "simply overruled The Tungus" and left The Harrisburg (referred to in the Moragne text at footnote 10) in force. The three sentences of footnote 10 which follow the initial sentence, quoted above, explain why "training Moragne solely on The Tungus" would not have accomplished everything the Moragne Court had in mind.

compelling evidence is to be found in the Court of Appeals's *Yamaha* opinion. That court's opinion describes The Tungus as deciding that "pre-*Moragne* rights of non-seaman killed in state territorial waters depend on state wrongful death statute." 40 F.3d at 641. In a footnote, the opinion goes on to observe: "This aspect of the holding of *The Tungus* retains vitality post-*Moragne*, for the *Moragne* Court 'concluded that the primary source of the confusion [in the law of maritime wrongful deaths] is not to be found in *The Tungus*, but in *The Harrisburg*,' *Moragne*, 398 U.S. 375 at 378 . . . only the latter of which *Moragne* accordingly overruled. *Id.* at 409." 40 F.3d at 641 n. 39.

I conclude, therefore, that, certainly in this circuit, *The Tungus*, with all its Harrisburg-era warts, remains good law with respect to the proposition that "rights of non-seaman killed in state territorial waters depend on state wrongful death statute." The substantive rights of those suing derivatively from, or in the name of, nonseafarers killed in the territorial waters of a state have their source in state law, not federal law. This conclusion is mandated by the opinion of the Court of Appeals which–in conjunction with the *Yamaha* opinion of the Supreme Court–governs this case. This conclusion also appears to be in harmony with the general receptivity to state law which infuses *Yamaha* at both levels of the appellate process–in correction of

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Mr. Johnson also observes that "the [Yamaha] Court notes that Moragne left in place the cause of action for negligence under Florida law." Johnson, supra at 157. The Yamaha Court did indeed so note, 516 U.S. at 214. But whether the Moragne Court could have addressed the viability of the negligence claim, given the procedural posture of the case (see Moragne, 398 U.S. at 376-377, 378 n. 1), may well be matter for debate.

my prior analysis.

The last question to be resolved is whether the state substantive law to be looked to is that of Pennsylvania or Puerto Rico. The answer to this is provided by *The Tungus* which quotes (358 U.S. at 591) from the Supreme Court's opinion in *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242, 42 S.Ct. 89, 66 L.Ed. 210 (1921) as follows: "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." Since Puerto Rico is the jurisdiction "on [whose] navigable waters" Natalie Calhoun met her tragic death, it is the substantive law of Puerto Rico which is the source of the rights of Natalie's parents, Lucien and Robin Calhoun.

Conclusion

In the order accompanying this opinion, this court directs that:

(1) with respect to the remedies that plaintiffs may seek, (a) partial summary judgment is granted to Yamaha,[8] insofar as Yamaha has moved to preclude plaintiffs from seeking punitive damages against Yamaha, and (b) partial summary judgment is denied to Yamaha insofar as Yamaha has moved to preclude plaintiffs from seeking compensatory damages as authorized by Pennsylvania law rather than as authorized by Puerto Rico law, plaintiffs being entitled to sue for whatever compensatory

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[8]As noted at the beginning of this opinion, the term "Yamaha" denotes both defendants.

damages the Pennsylvania law of remedies authorizes in wrongful death actions;[9]

(2) plaintiffs' substantive liability claims have their source in the law of Puerto Rico governing wrongful death actions;

(3) given that, in this court's view, there is "substantial ground for difference of opinion" as to the legal principles underlying the foregoing two numbered paragraphs, and because, in this court's view, "an immediate appeal from the order" embodying the foregoing determinations "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), this court concludes that it would be proper to recommend to the Court of Appeals that it exercise its discretion to review these two interlocutory determinations. Specifically, this court, pursuant to 28 U.S.C. § 1292(b), certifies to the Court of Appeals the following questions:

> Natalie Calhoun, the twelve-year old daughter of Lucien and Robin Calhoun, who are Pennsylvania residents, was killed when the "Wavejammer" jet ski she had rented, while on a vacation trip to Puerto Rico with a friend and her friend's parents, crashed into a vessel anchored in territorial waters just off shore. Natalie's parents brought suit against Yamaha Motor Corporation, a Japanese corporation which is the manufacturer of Wavejammer jet skis, and Yamaha Motor Co., Ltd., a California corporation which is the American distributor of Wavejammers (the defendants are hereinafter collectively referred to as "Yamaha"),

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[9]The term "wrongful death actions" is to be understood as including survival actions. See note 5, supra.

in a federal district court in Pennsylvania. The complaint, which alleges defects in the Wavejammer Natalie Calhoun rented, sounds in negligence, strict liability, and implied warranties of merchantability and fitness. The Court of Appeals for the Third Circuit, 40 F.3d 622 and the Supreme Court, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 2d 578, have concluded that the Calhouns' suit against Yamaha, arising out of their daughter's tragic death, is an admiralty suit arising under the aegis of *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970). Further, in considering what sorts of damages the Calhouns may sue for, the two appellate courts have concluded that the question of what damages may be sought under this *Moragne* cause of action is a matter of state law. But the two appellate courts did not themselves undertake to decide what state's law would govern: That question–involving a choice between the remedial law of Pennsylvania and that of Puerto Rico–was to be addressed, in the first instance, by this court on remand. Similarly, the two appellate courts reserved decision on what state's substantive liability law was the source of the Calhoun's suit. The questions now posed are these:

1. Did this court err in deciding, on remand, that partial summary judgment should be granted to Yamaha, precluding any claim by the Calhouns for punitive damages, on the ground that (a) the availability of punitive damages should be determined by the remedial law of Puerto Rico, the situs of the tragic accident giving rise to the suit, and (b) the law of remedies of Puerto Rico makes no provision for punitive damages?

2. Did this court err in deciding, on remand, that the Calhouns' entitlement to seek particular categories of compensatory damages should be determined by the law of remedies of Pennsylvania, the state of residence of Lucien and Robin Calhoun and of their daughter Natalie, rather than by the law of remedies of Puerto Rico, the situs of Natalie's fatal accident, and hence that Yamaha's motion for partial summary judgment should be denied insofar as it sought to preclude the Calhouns from seeking compensatory damages in conformity with the law of remedies of Pennsylvania?

3. Did this court err in deciding, on remand, that the jurisdiction whose substantive liability law is the source of the Calhouns' claims is Puerto Rico?

ORDER

For the reasons set forth in the accompanying opinion, it is hereby ordered that:

(1) with respect to the remedies that plaintiffs may seek, (a) partial summary judgment is GRANTED to defendants (hereinafter, "Yamaha") insofar as Yamaha has moved to preclude plaintiffs from seeking punitive damages against Yamaha, and (b) partial summary judgment is DENIED to Yamaha insofar as Yamaha has moved to preclude plaintiffs from seeking compensatory damages as authorized by Pennsylvania law rather than as authorized by Puerto Rico law, plaintiffs being entitled to sue for whatever compensatory damages the Pennsylvania law of remedies authorizes in wrongful death actions (the term "wrongful death actions" is to be understood as including survival actions);

(2) plaintiffs' substantive liability claims have their source in the law of Puerto Rico governing wrongful death actions;

(3) given that, in this court's view, there is "substantial ground for difference of opinion" as to the legal principles underlying the foregoing two numbered paragraphs, and because, in this court's view, "an immediate appeal from the order" embodying the foregoing determinations "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), this court concludes that it would be proper to recommend to the Court of Appeals that it exercise its discretion to review these two interlocutory determinations. Specifically, this court, pursuant to 28 U.S.C. § 1292(b), certifies to the Court of Appeals the following questions:

Natalie Calhoun, the twelve-year old daughter of Lucien and Robin Calhoun, who are Pennsylvania residents, was killed when the "Wavejammer" jet ski she had rented, while on a vacation trip to Puerto Rico with a friend and her friend's parents, crashed into a vessel anchored in territorial waters just off shore. Natalie's parents brought suit against Yamaha Motor Corporation, a Japanese corporation which is the manufacturer of Wavejammer jet skis, and Yamaha Motor Co., Ltd., a California corporation which is the American distributor of Wavejammers (the defendants are hereinafter collectively referred to as "Yamaha"), in a federal district court in Pennsylvania. The complaint, which alleges defects in the Wavejammer Natalie Calhoun rented, sounds in negligence, strict liability, and implied warranties of merchantability and fitness. The Court of Appeals for the Third Circuit, 40 F.3d 622 and the Supreme Court, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578, have concluded that the Calhouns' suit against Yamaha, arising out of their daughter's tragic death, is an admiralty suit arising under the aegis of *Moragne v. States*

Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). Further, in considering what sorts of damages the Calhouns may sue for, the two appellate courts have concluded that the question of what damages may be sought under this *Moragne* cause of action is a matter of state law. But the two appellate courts did not themselves undertake to decide what state's law would govern: That question–involving a choice between the remedial law of Pennsylvania and that of Puerto Rico–was to be addressed, in the first instance, by this court on remand. Similarly, the two appellate courts reserved decision on what state's substantive liability law was the source of the Calhoun's suit. The questions now posed are these:

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2. Did this court err in deciding, on remand, that the Calhouns' entitlement to seek particular categories of compensatory damages should be determined by the law of remedies of Pennsylvania, the state of residence of Lucien and Robin Calhoun and of their daughter Natalie, rather than by the law of remedies of Puerto Rico, the situs of Natalie's fatal accident, and hence that Yamaha's motion for partial summary judgment should be denied insofar as it sought to preclude the Calhouns from seeking compensatory damages in conformity with the law of remedies of Pennsylvania?

3. Did this court err in deciding, on remand, that the jurisdiction whose substantive liability law is the source of the Calhouns' claims is Puerto Rico?

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1378

LUCIEN B. CALHOUN;
ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

*YAMAHA MOTOR CORPORATION, USA;
YAMAHA MOTOR CO., LTD.;

Lucien B. Calhoun;
Robin L. Calhoun,
Appellants

*(Amended as per the Clerk's 6/1/99 Order)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 90-cv-04295)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO,
FUENTES, and GARTH* Circuit Judges

The petition for rehearing filed by the Appellants in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby **DENIED**.

Chief Judge Becker and Judge Ambro would have granted rehearing.

By the Court

_____
United States Circuit Judge

Dated: 01 AUG 2000

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*Vote limited to panel rehearing only.